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REPORTS OF CASES

Argued, Debated, and Adjudged in the
Court of King's Bench,

In the Reign of Queen ANN:

MORE PARTICULARLY,

During the Time the late LORD CHIEF JUSTICE HOLT
presided in that COURT.

WITH

TWO TABLES;

The One of the NAMES of the CASES, the other of the
PRINCIPAL MATTERS.

The SECOND EDITION:

Corrected and Improved by a great Number of NOTES and applicable
REFERENCES.

To which are added,

Some select CASES, ARGUMENTS and PLEADINGS, in the same
COURT; and principally during the same Period.

By THOMAS LUTWYCHE, Esq;
Late BARRISTER AT LAW, and One of His MAJESTY'S
Learned COUNSEL.

LONDON:

Printed by His Majesty's Law-Printers;

FOR

E. BROOKE (Successor to Messrs. WORRALL and TOVEY)
in Bell-Yard, Temple-Bar.

MDCCLXXXI.

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REPORTS

CRASES

Count of King's Bench

In the Reign of Queen ANN

By Thomas Lutwyche, Esq.

TWO TABLES



Some select Cases, Arguments and Proceedings in the same
and Courts, and principally during the same Period.

By THOMAS LUTWYCHE, Esq.
Barrister at Law, and One of His Majesty's
Judges of the Court of Common Pleas.

LONDON: Printed by J. M. B. at the Sign of the Crown in St. Paul's Church-Yard, 1751.

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MDCCCLXXI

T H E
P R E F A C E
T O T H E F I R S T E D I T I O N.

TH E Editor of this Report begs leave to offer a few words;
1st, As to the *contents* of the work; and 2^{dly}, of the
motive or *cause* of its publication.

1st. The former of these may (in general) be seen in the *title-page*, and in the table at the end. But as the title-page imports *cases argued, debated, and adjudged* in *B. R.* only, it may be necessary here to inform the Reader, that some few cases will herein be also found, which were argued and adjudged in *C. B.* Of this kind are those of *Archer* and *Bokenham*, and *Abbot* and *Burton*.

2^{dly}, The *motive* or *cause* of its publication, was chiefly to supply a *lacuna* or *chasm*, that at present appears in our printed reports; for the Editor hereof observing, that *Faresley*, 6 *Mod.* &c. proceeds no further than the end of the third year of queen *Anne*; and that *Cases in Law and Equity* begin with the ninth of the same queen, (and consequently that there was a *vacuum* of at least five years); he could not but apprehend it might be of some use and benefit to his profession, to publish such cases as had occurred in *B. R.* during that *interstitium*, which ends with the death of Sir *John Holt*, Knt. late lord chief justice of that court.

And as, in preparing this work, the Editor found certain cases of *excellent learning* argued and adjudged in *C. B.* (as is before observed) he thought himself obliged to communicate those also to the *public*.

Nor are other cases herein contained, which, *prima facie*, may seem of small import, to be for that cause totally rejected; for (as the lord chief justice *Coke* long since observed) *there is no case in the law, however immaterial or insignificant it may at first sight appear, but some time or other will stand a studious reader and diligent practiser in good stead.*

To such readers, to such *practisers*, is this report recommended.

Middle-Temple.

A D V E R -

ADVERTISEMENT

TO THE
PRESENT EDITION.

THE publisher of this Second Edition being possessed of some manuscript cases and pleadings, argued and adjudged in the reign of queen *Ann*, and taken in a very accurate manner by the late Mr. *Lutwyche*, was induced, by the opinion of a very great authority, (to whose labours in this kind the Public is very much indebted) to give them to the World: With this view a gentleman of the profession was applied to, who has selected such of the cases as appeared, in his judgment, more particularly worthy the attention of the profession; with such of the pleadings as related to those cases, and to others of consequence before published in this and other reports: These, it may be observed, are principally added by way of SUPPLEMENT at the end of the book; such of them only being inserted in the body of it, as were necessary to compleat the cases there reported. Besides the addition of this new matter, the old cases have undergone a thorough revision and correction: some explanatory notes are added; and, to illustrate the whole, upwards of a thousand marginal references have been collected and applied, shewing the same cases in other books, and parallel cases in more modern ones. The tables of course are considerably enlarged; and, upon the whole, we now venture to recommend this book to the profession, as much more worthy, than it has hitherto appeared, of the distinguished title of the ELEVENTH MODERN.

Easter

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Easter

* Easter Term, 1702.

* Page 1.

I Annæ Reginae in B. R.

Note ; In this and some succeeding Terms, the following Opinions were obiter delivered by the said Court of B. R. Holt Chief Justice.

1. **W**HEN a trial has been twice had on the same issue, and both verdicts agree, it would be unreasonable to grant a new trial: But if a sheriff returns a jury contrary to a rule of court, or commits any such irregularity, to the prejudice of either party, it may be a good cause to set aside the verdict, &c. But when no material cause can be shewn, this court will always have too great an esteem for a verdict, to grant a new trial. And yet when any unforeseen accident happens, or some sudden impediment, as sickness, &c. to a witness, and a trial is had, and a verdict given for the plaintiff, which might have been given for the defendant, had that witness been produced, in such cases this court will grant a new trial, on paying costs of the former trial.

New Trial.
6 Mod. 23.
Salk. 649.
pl. 25. but
see 4 Burr.
2109.

2. Where a trial is had upon a view, this court will not easily be induced to grant a new one: For the view is supposed to govern the jury more than the evidence at the trial; and therefore, in such cases, there ought to be some great irregularity in the jury, to obtain a new trial.

Trial on
View.
5 New Abr.
240. So of a
trial at bar.
Carth. 507.
Salk. 650.
ubi supra.

3. * Where a bond for payment of money has lain dormant twenty years, if, on an action brought thereon, the defendant pleads *Solvit ad diem*, Holt Ch. J. said, This will be a good plea, &c. For it is a strong presumption the bond has been satisfied, where there has been no demand made, nor action brought thereon, in so long a time.

* P. 2.
Dormant
Bond.
6 Mod. 22.
Ld. Raym.
1370. Str.
826.
S. C. Str. 652.
Bailon Error
Bond to pay,
&c.
See the sta-
tute and Holt
268.

4. Note; By the stat. 3 J. 1. c. 8. when a writ of error is brought on a judgment had upon a bond conditioned to pay money only, there special bail ought to be given: And after a year, a *scire facias* ought to precede the *levari*, or *fieri facias*.

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Bail, &c.
6 Mod. 77.

5. If one, who becomes *bail*, has a warrant of attorney to indemnify him, yet he cannot enter it up, and take out execution upon it, till some process is gone out upon the *bail-bond*, whereby he has an injury done him.

Id. 24.

6. Notice of bail, on an arrest, &c. ought to be not only by a Note given of the parties names who are to be bail, but also of their addition, trade, substance and place of abode; that so they may be the more easily inquired after by the plaintiff or his attorney.

Original
Writ.
See the statute
(18 El. c. 14.)
and *quere*.

7. When the suit is by original writ, the statute of *jeofails* will not help a bad writ (original); *contra*, where the suit is by mesne process, as *bill of Midd' latitat*, &c. For the difference herein between trespass and trespass on the case, see *Hob.* 180. 2 *Cro.* 542.

Impar lance.
Nil dicit.
6 Mod. 5.

8. An impar lance ought not to be granted, unless it is prayed or asked by the party; and on a *nil dicit* judgment is to be given *instante*.

Plea in Abate-
ment.
1 Salk. 367.
Str. 1192.

9. Pleas in abatement must be within four full days in term: For if a declaration be given four days before the end of a term, the defendant cannot plead in *abatement* the next term; nor will a plea in *abatement* be allowed *ordinarily* after a general impar lance. See *Instit. Legal.* p. 518, 519.

Ill Plea.
6 Mod. 2,
&c. *Tamen*
quere; for if
the plea put
in issue a
point that is
1 Burr. 295, &c.

10. If *A.* puts in an ill plea, and *B.* joins issue upon it, and a verdict is given against *B.* now *B.* shall never take advantage of *A.*'s bad plea, having slipt his opportunity of demurring to it: But it may be aided by the statute of *jeofails*.

immaterial, the court will award a repleader. See Doct. pl. 311. 1 Lev. 32. & 1 Burr. 295, &c.

* P. 3.

Arrest of
judgment
and *possea*.
2 Lil. pr.
reg. 120.
1 Salk. 47,
53.

11. * Before one moves in arrest of judgment, the *possea* ought to be in court, and delivered to the clerk in court; and after it is so brought in, the counsel have four days to move in arrest of judgment; nor will the court grant a rule to alter or amend a *possea* after it is returned and filed. — *Quere*, If not frequently done, if in the same term it is filed.

Certiorari to
justices of
peace.
But see 1
Salk. 149.
6 Mod. 17.
Holt. 132.
S. C.

12. *Note*; The court will not incline to grant a *certiorari* to the justices of peace when a person is convicted: But the justices ought to give judgment; for a *certiorari* to justices is rather to aid them, when a man would creep out of their jurisdiction, and so to bring him into this court, which has a more extensive power to punish him. 2.

Motion to
quash his own
writ.

13. A motion to quash a writ taken out by the party himself, is not grantable of course, but some sufficient cause ought to be shewn to the court.

Cro. Jac. 35.
Holt. 271.

5 Mod. 67. S. C.

Title.
1 Salk. 360,
6 Mod. 311.
S. C.

14. It is not necessary against a wrong doer to set forth any title; *i. e.* whether by prescription or otherwise; especially where the Action is grounded on the possession.

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15. *Note*; The word *scienter* was held necessary to be inserted in an indictment of forgery. *Q.*

Scienter.
Holt 326.

16. *Note*; Before a hawker, pedlar, or the like, can be deemed a vagrant, he must be wandering abroad, and out of his own parish.

Vagrant. *i.*
See 17 G. 2.
c. 5. and
Burn tit.
Vagrant.

17. If a prisoner makes a negligent escape, and afterwards, upon an agreement between him and the plaintiff, at whose suit he is in execution, the plaintiff discharges him, the marshal or gaoler cannot take him; for the retaking him, and rendring him to the county gaol upon the late statute, is only a shifting the gaol, and is wholly founded upon the original process, and only a continuation thereof. Mr. Justice *Powell* put this case: Suppose the marshal suffers an escape, and then by virtue of the late act of parliament, by a judge's warrant, the plaintiff retakes him, if escape lies against the marshal? To which the court gave no answer.

Prisoner.
Negligent
escape.
1 Salk. 213.
345.
3 Salk. 150.
6 Mod. 254.
S. C.

18. If a person is in the custody of the marshal at the suit of *A.* and *B.* in the vacation-time would charge *him there; *Q.* how it must be done; for arrest him he cannot, because he is already in custody; and file a bill, the clerk said, he could not do in the vacation, nor deliver a declaration but in term-time; so that unless a *remanet in custodia*, entred in the marshal's book, should be a charge sufficient to ground an escape upon, the party would be without remedy; and so, for the necessity, the better opinion of the court seemed to be, that it was a good charge: Then a question arose, what time the plaintiff had to declare; in which the clerks of the court differed: For some held, it ought to be the term following; others said, he had two terms to declare in; but *Holt* said, that was too long to keep a man in custody upon a *remanet*, and ordered a reference to Mr. *Clerk*, who said, the plaintiff ought to deliver a copy of the declaration to the turnkey, or marshal, some time the next term; but *Powell* thought the plaintiff had two terms.

Prisoner
charged in
custody.
Ibid.
2 Burr. 1052.
* P. 4.

Ibid. & Reg.
East. 5 W. &
M. & Trin.
2 G. 1. B. R.
3 Burr. 1448,
1841.

19. But *Note*; By *Holt* Ch. J. A *remanet in custodia* will not charge a prisoner that has escaped, though the marshal should own him to be a prisoner in custody: And he also said, it was against law to charge a man in custody that is not in custody; for if he has escaped, he cannot take notice of any proceedings against him in a place where he is not. But the marshal's owning a person to be in his custody, will make the marshal liable to an escape, and charge himself. If a person in custody goes out of prison, and returns again (at night); and does so frequently; This *Holt* said was a continuance of the custody *ab initio*, and he might be charged with a *remanet in custodia*, or a declaration; for by his returning into the prison, he may have notice of the proceedings against him.

A *remanet in
custodia* charges only the
marshal, after
an escape.
1 Salk. 213.
345.
3 Salk. 150.
6 Mod. 254.
S. C.

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Recogni-
zance,
Salk. 370.
pl. 4

20. If a person enters into a recognizance to go to trial of an indictment, and by his own act he procures a wrong *venire facias*, so as the indictment is quashed; *Holt* said, this was a forfeiture of his recognizance; it being a trifling with the court, and an ill practice in putting the prosecutor to a great charge.

* P. 5.

Impar-
lance
on an infor-
mation.

1 Salk. 367.

3 Salk. 185.

6 Mod. 243.

21. * The printer of a pamphlet, called *Legions Address*, was bound to appear in the Queen's Bench the first day of the term, and then Mr. Attorney exhibited an information against him; the defendant's attorney prayed an imparlance; and the question was, how long time he should have to imparl? Mr. Attorney prayed it might be ruled according to the civil side, *viz.* to plead some day within the term; but the clerks said, the custom on the crown side is to give a term. *Holt* said, formerly they went upon this reason, that the term, in the eye of the law, is but one day: But he said, there being an imparlance due by law, he thought it would be hard to make a rule to govern this case; and ordered the clerk to search precedents.

An old mort-
gage, assets.
2 Salk. 449.

22. *Quare*; If tenant in tail contracts debts by bond, and dies, and it can be made to appear, that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term for years, which was kept on foot to wait upon the freehold and inheritance; if such lease in equity would not be assets in the hands of the heir in tail: For 'tis equity only makes such leases descend, and 'tis the highest equity a man's debts should be paid.

Prohibitions
to the admi-
ralty, &c.

1 Show. 179.

396.

Comb. 253.

448, 463.

23. All prohibitions are to be granted upon some suggestion, and not otherwise; which suggestions are to be brought into the office. But *Quare* of prohibitions to the admiralty. For the court of admiralty does not use to set forth the special matter whereon they give sentence; but only reciting, that they had heard both sides, and so proceed to give judgment: And then (they pretend) 'tis too late to move for a prohibition: But *per Holt* Ch. Just. 'Tis never too late to move for a prohibition after sentence, in any case but one, and that is to the ecclesiastical court, on the statute 23 H. 8. where the suit is out of the diocese. And the reason why a prohibition is denied in that case is, because you have by pleading owned their jurisdiction.

Hob. 79.

* P. 6.

1 Show. 172.

24. And note, Altho' in *Hobart* a rule is laid down, that for any thing not appearing in the libel, but only * suggested as matter collateral to it, no prohibition shall go after sentence: Yet in *Sbatter v. Friend*, a prohibition went to the Spiritual Court after sentence, where they had disallowed proof by one witness, tho' that matter did not appear in the libel or sentence: And *Dolben* in that case said, that a prohibition ought to go rather after sentence than before; for then 'twill best appear that they have disallowed such proof.

25. For

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25. For prohibitions after sentence, see 1 Sid. 65, 332. 1 Show. 158, 172. 6 Mod. 252. Farell. 148. and 337. See the case of *Edmondson v. Walker*, 1 Show. 179. A prohibition to the Admiralty for refusing a plea of claim of property. And see 6 Mod. 26. Where a prohibition shall go, if they refuse a plea of the statute of limitations. But note;

26. In term, 1 Ann. the opinion of this court seemed to be, that the statute of limitations, 21 Jac. 1. c. 16. did not extend to the Admiralty nor Spiritual Courts; for Holt C. J. said, if a battery was committed *super altum mare* above four years since, if the plaintiff sues for this in the Admiralty, he may well recover damages there. See 3 Lewinz 23. and 234. And suit in the Spiritual Court is only *pro reformatione morum*, &c. And note by stat. 4 & 5 Ann. c. 16. s. 18. no prohibition shall be to the Admiralty court, on a suit there for seamen's wages.

Limitations.
Hyde v. Partridge, post. 43.

27. Redemption of ships, &c. is a species of salvage. For if a pirate takes a ship, and the master redeems the goods, the owner shall make him satisfaction: For a master of a ship represents the owners, and may detain goods for salvage. But if he once parts with them out of his possession, he cannot afterwards take them by any admiralty jurisdiction or process. For if the goods are on land, and the Admiralty arrest the goods, a prohibition will go, if there is a libel; but if there be no libel, replevin or trespass is more proper.

Redemption of ships, &c.
6 Mod. 11.
Post 30.

28. If a sentence is given in a peculiar, the appeal is to the archbishop, and not to the bishop of the diocese; which proves it to be of exempt jurisdiction.

Peculiars.
Hob. 185.
&c.

* *Certain Cases heard and adjudged in the said Court of* * P. 7.
B. R. *in the same Easter Term, 1 Annæ Reginae.*

Stanmer versus Davers in B. R.

(1.) **I**N this case it was held *per Holt* and *curia*, that whenever an action is brought in an inferior court or jurisdiction, the compleat cause of action must be laid to arise within the jurisdiction; and if so, whatever matter lies in aggravation, need not be laid within the jurisdiction: As if an inn-keeper suffer my horse to be taken out of the stable, without my consent, it is a compleat cause of action; for thereby he is a wrong-doer: And tho' the riding and beating be done out of the jurisdiction, yet the inferior jurisdiction may hold plea of it: The compleat cause of action arising from the first taking; and the subsequent matter only being an aggravation. And note; this was on a writ of error of a judgment in the Marshalsea court; & *per tot' cur'*, judgment was after affirmed in the Queen's Bench, viz. in Mich. term, 3 Ann.

Inferior jurisdiction.
2 Ld. Raym. 795, 1040.
1 Salk. 404.
6 Mod. 223.
Holt 13. S. C. and see T. Raym. 75.
1 Saund. 73.
1 Lev. 50, 69.
1 Sid. 95.
Gilb. hist. C. B. 189.

C

Anonymous.

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Anonymous.

Nuisance by
new build-
ings, &c.
Co. Lit. 53.
a.
2 Ld. Raym.
1089.
1 Salk. 21,
360.
6 Mod. 311.

(2.) **I**F a lessee for years builds a house on the premises leased, 'tis waste; and if he let it fall, 'tis new waste. If a man has an upper-room, an action lies against him by one that has an under-room, to compel him to repair his roof: And so where a man has a ground-room, they over him may have an action to compel him to keep up and maintain his foundation. See stat. *Westm.* 2. c. 23. 2 *Inst.* 403. *Moor* 374. 6 *E.* 4. 7. *Kelw.* 98. *Reg.* 153. *Sed quare.*

For, if a man builds a new house, under the roof of an old house which is ready to tumble, if he shall have a writ *de reparatione facienda*? Because *debet et solet* or *consuevit* are necessary words in the declaration. 1 *Vent.* 274. And * *Dent* and *Oliver* in *Cro. Jac.* Where a man may have an action to charge a ter-tenant, he must lay a *debet & solet*, and shew a title.

Holt C.J. said, Every man of common right ought so to support his own house, as that it may not be an annoyance to another man's: But *Powel* J. put this case; Suppose a man makes a vault, and builds a wall thereto, and then his neighbour makes a cellar adjoining to the vault, which is damaged by a default in the wall of the vault, he thought that the owner of the cellar might well have an action: Which *Holt* denied; for by him, before the party could entitle himself to an action in that case, he ought first to build a wall to his cellar, as well as the other to his vault; otherwise he ought not to have any benefit from the first wall; unless it be indeed agreed, that he shall contribute to the repair of it, &c. Suppose a man has a vacant piece of ground, and builds a house upon part of it, and then sells the rest, the vendee cannot build so as to stop up any lights in the first house; but must take the ground subject to the incumbrance of the former lights.

Cooper versus The Hundred of Basingstoke.

A. assaulted
and seized in
the hundred
of B. but led
thence and
robbed in the
hundred of C.
the hundred
of C. is
chargeable.

(3.) **A**CTION on the statute of *Winton.* Upon a special verdict the case appeared to be this:

Highwaymen assault the plaintiff in the highway, in the hundred of *Micheldever*, and lead him out of the highway into a cops near adjoining; which cops was in the hundred of *Basingstoke*, and there they bind and rob him: And the question was, Whether the action was well brought against the hundred of *Basingstoke*.

The counsel for the plaintiff insisted, that the action was well brought against the hundred of *Basingstoke*: And the robbery in the

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the hundred of *B.* could not so relate to the first assault in the hundred of *M.* as to make it a robbery in the hundred of *M.* And insisted on two rules: *First*, That the law never operates by way of * relation, but in case of necessity, to prevent a wrong, or to do justice. *Secondly*, That a relation of law shall not operate to the injury of a third person. However an act may relate, by fiction of law, between the robbers and the party robbed; but yet it shall not relate to the prejudice of the hundred. *Hutton* 125. *Goldefb.* 86. *pl.* 11.

2 Ld. Raym.

826.

2 Salk. 614.

7 Mod. 157.

Holt 638. S.

C.

* P. 9.

The counsel for the defendant insisted, that the action ought to be against the hundred of *M.* where the first assault was; and that the rest is but one continued act. That the fault was in the hundred of *M.* where the assault was in the highway; but the robbery was not in the highway in the hundred of *B.* and the hundred is not obliged to guard other places. 6 Co. 64. *Cro. Car.* 266. That a traveller, going through a new way, shall not have an action against the hundred.

The action ought to be against both hundreds: And one reason why, if a robbery be *in divisis hundred*, both shall be liable, is, because both are in fault in not keeping watch.

In *Mich.* term following this case was spoke to again by Mr. *King* for the plaintiff, who said, that the action was well brought against *B.* for that the hundred, in which the taking the goods was, is only chargeable: And insisted on the words of the statutes 13 Ed. 1. 28 Ed. 3. 27 Eliz. all which mention the hundred where the robbery is done. Robbery is a *species* of theft, and differs from common larceny only in the manner of taking. *Hale's Pl. Cor.* 71. 3 *Inst.* 69. And to make a robbery, there must be a taking the goods from the person of the honest man into the possession of the thief. *Hale* 72. 3 *Inst.* 68, 69. Assault to rob a man is no robbery: Then the hundred of *Basingstoke* is the hundred where the robbery was committed; for the goods were there taken from the honest man. 3 *Inst.* 80. All crimes are local, and must be tried where committed. 13 Co. 53. *Hale's Pl. Cor.* 69. And therefore if the two hundreds were in two counties, it must be tried in the county where the taking from the person of the man was.

Obj. That a man may be said to be robbed where first assaulted; for he and all about him is in possession of the * thief; and the subsequent act shall relate to the first act. * P. 10.

Answ. The assault is no robbery. *Hale's Pl. Cor.* 71. Relations are but fictions in law, and never used but in cases of necessity. 3 *cro.* 28. But here is no need of such relation.

Obj. That the first default is in the hundred of *M.* in not keeping due watch.

Answ. That is grounded on a wrong construction of the intent of the statute. For the design of the statute is not only to punish the hundred, for not keeping watch, but to punish them if they

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See the case
and *quære*.

they do not take the offender after the robbery done, and to fortify the common law, by which the hundred was to be amerced, if they did not take the robbers; as appears in *Bracton*, *Coron.* 3. b. *Fitzb. Coron.* 238, 293, 352. *Stamford Pl. Cor.* 336. And the statute of *Winton* was made in affirmance of the common law. 3 *Inst.* 117. 2 *Ed.* 3. 6. b. 7. a. *Hutton* 125. *Gouldesb.* 86. A case had been cited on the other side, 1 *Sid.* 263. Where robbers drive the waggon out of the way in the day-time, and rifle it in the night, it shall be said a robbery in the day, and another in the night; but both these are extrajudicial, and not the point in question.

To the *obj.* that the action ought to be against both hundreds, it was answered, that the statute gives it only where the robbery is *in divisis hundred*, and not elsewhere. The authority of the case in 1 *Cro.* 266. where a traveller going through a new way cannot bring an action, may be questioned: Because it goes on that foundation, that the design of the statute is only to guard the highway, and not to take the robbers. And a case in 1 *Mod.* 221. *Savil* against the hundred of ——— is express in point.

* P. 11.

Broderick for the defendant argued, that the statute has always been construed equitably; and that the design of the act is to give an action against that hundred, which by the common law should have been amerced; and insisted on the title of the statute, that it is the * duty of the hundred only to guard the highway: And it must be supposed, that the robbery was committed in such a place, from whence hue and cry could be made. To the case in 1 *Mod.* 221. it was answered, that the exception taken there was only, that it was not laid in the declaration to be done in the highway; and that need not be any more than to lay it to be done in the day-time. But there are many authorities that confine it to the highway. 3 *Lev.* 262, 350. 2 *Cro.* 497. *Meor* 620. *Gouldesb.* 60. *King v. Smith*; the river of *Tbames* is adjudged to be a highway within that act. That the general practice is to watch on the highways only, which is a traditionable and reasonable exposition of the act. That if a hundred be answerable for a robbery, within an inclosure, yet the right hundred is not charged. For *M.* suffered the traveller to be assaulted, and in consequence of that negligence the party was robbed: But it does not appear but that the highways in *Basingstoke* were well guarded.

Opinion of
the court.

In *Hil.* term following, the Lord Ch. J. Holt gave judgment for the plaintiff, that the action is well brought against the hundred of *Basingstoke*.

It has been endeavoured to be maintained, that the robbery was begun in the hundred of *M.* but it is plain it was committed in *B.* If there had been two counties, as there are two hundreds, the trial must have been in the county where the robbery

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bery was; and the robbery being in *B.* the express words of the statute are, that that hundred shall be liable.

There is no reason to make it relate to the first assault. A stroke is given one day, and the party dies another, the death shall relate to the day of the stroke, so as to charge the lands, but not to collateral purposes. A mortal wound is given, and the party dies a month after it, the death shall not so relate to the stroke, as to make him, that before the death receives the murderer, an accessory. 11 H. 4. f. 49. and *Plowden* 401.

A pardon of all offences is granted after the stroke, and before the death, this pardons the stroke; and tho' the party die, the murderer is discharged. But here there * is no colour for a relation, for the assault is not the direct cause of the robbery. It may be a *causa sine qua non*, but not the necessary cause. This is the same point that was determined in *Hutton* 125. *Dean's* case. The case in *Gouldesb.* allows of this case. * P. 12.

Thieves take the horses from the carrier in one hundred, and rifle the packs in another, the first hundred shall be charged; because it was a robbery in that hundred: But if the carrier had led his horses himself into the second hundred, the second hundred should have been charged. Note.

The true reason of this case is, that the hundred of *Basingstoke* is charged, not because they did not prevent the robbery, but because they have not taken the malefactors: For if a robbery is committed, that does not charge the hundred, if within forty days they apprehend the thieves. Here was no obligation on the hundred of *M.* to pursue or apprehend them, because no robbery in their hundred.

If the assault had been in one hundred in the day, and the party was carried into another hundred, and kept till night, and there robbed: Or if he was assaulted in the highway in one hundred, and carried to a house in another hundred, and there robbed; in either of these cases no action had lain.

Lane and Others against Cotton in B. R.

(4.) **T**HIS term the court of Queen's Bench gave judgment in this cause, which had been argued several terms at the bar: The case was thus; viz. In an action on the case, the plaintiff declares upon the stat. 12 Car. 2. which establishes the general post-office; setting forth the said statute, with the exceptions therein, and then sets forth, that he delivered several Exchequer bills, inclosed in a letter cover, at a certain place, unto
Action on the case against the post-master for loss of Exchequer bills and a letter, delivered to an under-officer. See the case imperfectly reported in 1 Ld. Raym. 646: 1 Salk. 17, 143. Carth. 487. Comyas 100. Holt 582. 5 Mod. 455. and 12 Mod. 472. S. C. The pleadings are in 2 Mod. Intr. 108. N. B. This case was recognized, and the determination of the three judges confirmed, by the unanimous opinion of the court of King's Bench, in a late case of *Whitfield v. Lord Despencer*.

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* P. 13. a certain officer there, appointed by the post-master to receive letters and parcels, to be conveyed to the said general post-office : Which said letter and bills so delivered miscarried, and came not to the party's hands to whom they were directed.

And on not guilty pleaded, the jury found a special verdict ; in which all the said matter set forth in the declaration was found, and further, that the said general post-master takes security of his under-officers ; and that the letter cover in this case, was broke open, and the bills taken out, by a person unknown. And the question was, whether an action lay against the post-master for the nonfeasance or negligence of his under-officers.

Gau'd Just. argued, that judgment ought to be given for the defendant, and that upon consideration of the said act of parliament, viz.

First, This office was designed by the act to be a *letter* office only, for the benefit of commerce, by the quick dispatch of intelligence : And if it should happen, that a letter should miscarry, yet no action will lie for this loss : For tho' a man may have a property therein, yet that property is *nullius valoris*, of no value or esteem in law : Especially if it be only the communication of a man's mind, and no obligation contained in it. And by this reason will this case be ruled : For tho' these bills out of the Exchequer were of value, and trover will lie for them, yet they were conveyed here as letters, and so shall not have a worse effect, as to the post-master, than letters.

Secondly, Here is no such thing as a contract between the plaintiff and the post-master : For he is by a *medium* the king's officer. But if there is any such thing as a contract, it is between the plaintiff and the under-officer, who took the letter of the plaintiff ; and there is a trust reposed in the under-officer by the act ; and tho' such under-officer is named by the superior, he is in as it were by the king ; and suppose the post-master should die, the under-officers should be continued, and their places are not void thereby ; and then suppose this should have happened in such vacancy, then this under-officer should undoubtedly be only chargeable.

* P. 14. *Thirdly*, The act has provided, that if any of the under-officers commit any fault, they shall be cashiered, or turned out ; and so every officer by his superior, and the head-officer by the king ; as appears by the sixth and tenth paragraphs. Another consideration is, they are obliged to take in all letters and parcels brought to them ; if they might refuse them, it might be otherwise. Another is, that they are obliged to make speed, and to travel by night, when the law does not allow them the protection of the statute of hue and cry. And then as to *Moses's* case, cited on the other side, which was, where goods were put on board a ship, to be sent beyond sea, and were stolen out of the ship, in the port, by the negligence of the master ; and adjudged

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adjudged the master should be answerable ; there is this difference between this and that case, that the master of the ship makes his bargain for his carriage, half of which is paid down beforehand, which is a contract, and so at his peril he is to procure safe carriage ; but in this case the recompence is not variable on the contract of the parties ; and their revenue or profit, that arises out of this office, is but by accident, and not by contract.

Fourthly, If there were a trust, designed by this act, to be reposed in the post-master, and the law did allow the same trust to be in him, as in a carrier, a master of a ship, insurer, &c. yet this particular case is out of the act of parliament ; for it is designed by that act that he shall only take the trust of letters, and not of treasure, as these bills are.

Powis Just. First, He considered the several statutes that establish Exchequer bills, and upon the whole concluded that they were not *treasure*, nor of the nature of *current coin* ; his chief reason was, because no subject was obliged to take them in any payment ; neither were they a sufficient tender, and so they were things that were not forbid to be carried by the post, if any person would venture them. But *secondly*, he urged, that the officers were not responsible for any thing that was lost by accident ; and no misfeasance could be charged upon any of the officers ; * for the special verdict finds it to be done by a person unknown : * P. 15. Then he insisted upon the inconveniences the officers of the post-office were forced to undergo, because they were obliged to speed ; that they were often forced to deliver the letters to the servants, &c. of the person to whom they were directed ; and then when the party has received them safe, he may be alone when he opens them, and tho' he does safely receive such things as these bills in a letter, yet he may pretend he has lost them ; and besides, they are obliged to travel on Sundays, by night, and in countries out of the king's dominions ; and therefore they have not the protection which others have in case of robbery ; and then their *premium* is so small, that it bears no proportion to the trouble they have ; and if these actions were encouraged, it would set up a kind of insurance for carriage, and in a little time destroy the office.

Thirdly, The post-master general is not answerable for any neglect in the inferior officers ; for he is but a fellow-servant with them ; by the patent he has a salary appointed for him, and the under-officers for them ; and it is the king, and not he, that is their paymaster ; and moreover the patent appoints their security to be given to the king ; and all their salaries are to be paid to them by the receiver-general out of the publick revenues of the kingdom, and the *quantum* is settled by the patent ; and the post-master general has his office *durante beneplacito*.

But

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But it may be objected, that here may be a wrong sustained without any remedy. *Ans.* It is often so, when no person can be found against whom to have the remedy; so here the verdict finds it done *per personam ignotam*. So he concluded judgment *pro def.*

Turton was of the same opinion, and upon the same grounds.

Holt, Cap. Just. was of opinion, that judgment ought to be given for the plaintiff; and he said, it might be some question, whether this action would lie, if things had been lost upon the road in travelling; but it being found by the special verdict in this case, that they were lost * out of the office, all the arguments relating to that are out of the case.

* P. 16.

1st, This act was made for the publick good; and there is a trust reposed in the post-master, and he is to have the custody of the officers and the office; and he is like the marshal of the K. B. or Fleet prison, who are intrusted with the care of the prison, 4 Co. 84. And if their prisoners are freed by any insurrection, or tumult of the people, they shall not be excused: So the law intrusts a sheriff with the goods taken upon a *feri fac*, and he is to keep them for the plaintiff, and must make him satisfaction, if lost; and there is no difference between those instances and this case.

2^{dly}, The subject pays a reward for carrying letters; and it is like the case of a host, who shall be chargeable when he has a reward. 2 Cro. Gelly v. Clerk 188. Hob. 18. And as to Just. Gould's reason, that there is no contract between the parties, there needs none; for where the subject intrusts any one with valuable things, he must have a remedy for them; which here, can be against none but the post-master: It was resolved not long since, that an action would lie against the master of a ship, for things stolen out of the ship, because the master is intrusted with the care of them; and as the post-master has no advantage of the profits of the office, but has his salary from the king; so the master of a ship is paid by the owners.

3^{dly}, The same circumstances concur in this case to make the defendant chargeable, as in the other cases of a carrier, or a master of a ship, &c. The reason which is given in the civil law, for making a carrier chargeable, and upon which our law, no doubt, was founded, is, because a carrier may be in correspondence with those that rob him; and the like reason may be given here. As to the objection, that a carrier is chargeable because he may sue the hundred, it is not good; for this action lay against him before the statute of *Winton*; and if he loses goods out of his warehouse, this action will lie against him; yet in that case he cannot sue the hundred. If a smith * upon the road refuse to shoe my horse, I shall have an action upon the case against him. *Kelway* 50. And here the post-master is obliged to take in such things as are within the statute; and these bills are proper to be

* P. 17.

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sent by the post; for it appears by the act, which limits what shall be carried, that other things than letters may be carried; and the act seems to permit any thing that is light of carriage to be carried; and tho' these bills are things, created since the act of 12 Car. 2. and so could not be taken notice of in that act, yet they are within the same reason as the things limited in the act.

4^{thly}, The post-master here accepts the letters under the same condition, for safe keeping; as in *Southcote's* case, in the 4 Rep. 83. b. *Southcote* lent the defendant his goods, *safement garder*, and they being stole from him, *Southcote* recovered in detinue for them; it is granted that those, that were post-masters before the act, were liable, and received such letters and parcels under such condition of *safement garder*; and since it is not apparent the act makes any difference, it would be very hard to bar the subject of his action, when the act has barred him of his choice; for now he is confined to one post-master, whereas before he might chuse out of several.

5^{thly}, If a deputy is guilty of misfeasance, an action will lie against him; but for the nonfeasance or negligence of a deputy, the superior is punishable; and in this case, if any misfeasance could be proved upon any particular deputy, as the taking out of the bills by him, he should have been punishable; and if a deputy does any act, which if done by a superior would be a forfeiture of his office, such act by a deputy will have the same effect. As to Mr. Justice *Powis's* argument, who makes the post-master general a servant with the inferior officers, I think otherwise; because tho' they are not under his pay, yet they are under his direction, and so are his servants. Besides in other particulars, it appears by the act itself, that the post-master general shall be accountable for the act of his inferior, viz. the clause relating to the * providing of horses; in that case if a deputy at *York* refuse horses, it is the post-master general shall incur the forfeiture. * P. 18.

And a writ of error was brought, and allowed on these reasons of Holt Ch. Just. Sed quare quid inde venit?

In Domo Procerum.

Inter Ranger and Ashmead.

- (5.) A Copyholder for life of a house and land, that by the custom of the manor may fell timber for repairs of the copyhold tenement, brings an action of trespass against the servant of the lord who entered by the lord's command, and cut timber upon the lands of the copyholder, by which the copyholder had not sufficient to repair the copyhold tenement; adjudged
- Copyholder bound to repairs, the lord cuts his timber. 2 Salk. 638. 12 Mod. 378. Holt 162. Fortesc. 152. S. C.
- E

Easter Term 1 Ann.

judged in *B. R.* by all the court, that the copyholder might have this action; which judgment was afterwards affirmed in the Exchequer-chamber by all the judges in *England*; and now reversed in the House of Lords, eleven against ten. *Vide 13 Rep. 67. Heydon and Smith. Godbolt 172. S. C.*

Heu misera servitus! ubi jus est vagum.

* P. 19.

* Trin. Term, 1702.

1 Annæ Reginae in B. R.

Matchel and Clerk.

Tenant in
Tail stands
seised to Uses,
&c.
2 Ld. Raym.
778.
2 Salk. 619.
Holt. 615.
7 Mod. 18.
Comyns 119.
S. C.

(1.) **I**N error out of *C. B.* the case upon the special verdict was thus: Tenant in tail covenants to stand seised to the use of himself for life, remainder to divers other persons; afterwards he suffers a recovery to other uses; the question was, if this recovery was a good recovery? If by the covenant to stand seised, he made any alteration in the estate-tail, then the recovery could not be good; for there was a wrong tenant to the *præcipe*; if by the covenant to stand seised, there was not any alteration, then it was good. But all the court held, that by the covenant to stand seised there was no alteration, and so the recovery good. *Holt Cap' Just'*, delivered the opinion of the court, as follows:

It has been a question, if tenant in tail makes a grant with livery, bargain and sale, lease or release, it gives the grantee, bargainee, &c. any greater estate than for life of tenant in tail; but it has been held, that it creates a base fee in such grantee, &c. which is against the opinion of *Litt. Ject. 649, 650.* and the reasons for it have been these:

1st. Because tenant in tail has more than an estate for life; he has the inheritance in him, as appears by *Co. Lit. fo. 18. a.* If a gift in tail be made to a villain, and the lord enter, the lord has a fee-simple qualified, * which could not be, if the villain, as tenant in tail, had not as great an estate in him.

2dly. He

* P. 20.

Trinity Term 1 Ann.

2dly. He has the whole estate in him: Therefore these sort of conveyances are incidents to it.

3dly. It is no prejudice to the heir in tail, nor against the statute *de donis*; the putting the issue to a formedon is no breach of the statute *de donis*, so it does not put him to an entry. 10 Co. 96. *Seymour's Case*; and 3 Co. 84. the case of fines: Such bargainee has a descendible estate, and his wife shall be endowed of such estate. *Litt.* says, "*the estate of such releasee or bargainee is determined by the death of tenant in tail*;" but by these opinions 'tis not determined till the issue enter. The issue is not barred of his *jus recuperandi*, but till he uses that, the other has a good estate; and so *Winche's Rep.* 5. *Bridgman* 92. The case of exchange in *Co. Lit.* 5. If tenant in tail in exchange give a fee-simple, it is good till avoided by the issue in tail; and yet the rule is, that both the estates exchanged must be equal in quality; which proves there may be a fee-simple passed out of the tenant in tail, and good till avoided by the issue: But notwithstanding all this, in this case, the covenant to stand seised does not alter the estate-tail, and so the recovery is good; because by this covenant these uses do not take effect during the life of tenant in tail, which they must do, if they make any alteration in the estate-tail; or at least there must be a possibility of their taking effect during his life; but here they are not to vest till after his death, and so signify nothing, because the title of the heir in tail, which is paramount, vests immediately. But it may be said, That here he has made himself tenant for life, and by that, the estate-tail is altered during his life: But to this I answer, that it has no effect thereon, but is absolutely void as to that, it being only made to support the remainders. And the judgment in *C. B.* was affirmed.

N. B. The case in 1 *Sand.* 260. and *Lit. f.* 612. was denied to be law in this case, *per Holt Ch. Just.*

• Hil.

* P. 21.

* Hil. Term, 1702.

I Annæ Reginae in B. R.

Jasper *versus* Eadows.

Trespass:
A distress e-
scapes *contra*
the distress-
er's consent;
no remedy
for damage.
1 Ld. Raym.
719.
1 Salk. 248.
Holt 256.
12 Mod. 658.
S. C.

(1.) **T**RESPASS *quare clausum fregit*, and destroyed his oats. Defendant confesseth the trespass, which was committed by a pig; and pleads in bar, that the plaintiff distrained the pig for the trespass, and him *imparcavit & detinuit*. The plaintiff by replication confesseth the taking and impounding of the pig, but that it escaped without his consent; the defendant demurs, Justice Gould. That the plea is naught, for not saying *ad hoc detinet*; and the replication good, without saying that the pig escaped *sine defaultu* of the plaintiff: And that judgment ought to be *pro quer.*

* P. 22.

The plaintiff had his election to bring his action or distrain; and tho' he distrained, if the distress had died, the right of the action would have remained to the plaintiff. *Dr. & Stud. ca. 27. Hob. 61.* And the reason is, because the distress is in the nature of a pledge, which may be pleaded in bar, so long as it is in the plaintiff's possession; but being once destroyed or cloined, without his default, the plaintiff's action is revived. If the pig had been rescued in carrying to the pound, he might pursue and retake it. *27 Aff. pl. 74.* And in such case it would be in his election to admit himself out of the possession or not. *2 Cro. 50.* If the plaintiff had suffered the pig to escape by his own consent, the trespass had been discharged; but that should have been shewn in the bar. And the plaintiff says, it escaped *contra consensum* * & *voluntatem*: Besides the bar is bad for not saying, & *ad hoc detinet*. *Scire fac'* against the bail, on a judgment against the principal, the bail pleads the defendant was in custody; this plea is bad, without saying he is still in custody. *Rast. 171.* So it is regularly true, you must aver that which continues the wrong. *12 H. 8. 2. 13 H. 8. 5.* The replication is good to a common intent; and if any default was in the plaintiff, it ought to have been shewn by the defendant, who is to have the advantage. *1 Leo. 18. 1 Vent. 54.* If the defendant sued a replevin, the sheriff might return the special mat-
ter,

Hilary Term 1 Ann.

ter, that the pig was dead, or taken away by the defendant, or escaped. *Brook. tit. Ret. 125. Dalton Ret. 124.* And therefore judgment ought to be for the plaintiff.

Justice *Powis*. At common law distress is only a gage, and no satisfaction. *2 Cro. 148. Hob. 61.* But since the statute of *W. 3.* it is a satisfaction, as to rent; but as to trespass, the common law is not altered. And the distress is so far a gage, that he cannot do any thing for *the bettering the distress*: And that is the reason, that if a milch cow is distrained, the *distrainer cannot milk her*. *1 Roll. 673.* which is of better authority than *2 Cro. 148.* Nor can the *distrainer* tie the *distress* in the pound; for he cannot meddle further than barely impounding it. It should seem reasonable that the distrainer should have further indulgence in a publick than in a private pound. If cattle distrained for rent die in the pound, he may take a new distress. *Dyer 28. Hob. 61. 25 Ed. 5, 6.*

But I take it, that in this case the plea is good, and the replication bad.

For he does not say the pig escaped without his default; and it may very well escape against his will or consent, and yet by his default: For suppose, after the pig was impounded, the plaintiff opens the door of the pound, and the pig slips out, this is against his *will*, and yet by his default.

To the objection, That the defendant in his bar ought to have said *& adhuc detinet*, I answer, The plea is good to a common intent; and I think better pleaded as it is: For he * sets forth the truth, and it might be dangerous to say *& adhuc detinet*: For the plaintiff might traverse it; and it is enough for the defendant that the *detinet* is intended by the law; and therefore judgment ought to be *pro def.* * P. 23.

Justice *Turton*. The plaintiff had his choice of two remedies, distress or trespass, and his election of one is the rejection of the other. *Levy per distress* is a good bar to debt for rent; and for *Post 144.* the same reason a good bar in trespass. A distress is no satisfaction, but may be kept till satisfaction; and it is the plaintiff's duty to keep the distress. *First*, Because he had a choice of his pound. *Secondly*, He had an interest in the pound, tho' in another man's ground: For the pound is his pound, and he only can have a *parco fracto*, and not his servant, or the owner of the soil. *Thirdly*, If the plaintiff had distrained dead goods, he must have put them in a pound covert, that they might be kept dry; otherwise if they were spoiled or abused, he is to answer for them. *Co. Lit. 47. 1 Roll. 133.* Whence it may be inferred, it is at the plaintiff's peril to put the distress in a safe pound, and keep it in safe custody. If the defendant had taken away the distress, a *parco fracto* would have lain against him; and that was his only remedy, and not an action of trespass. It does not appear the defendant ever got his pig again; and it is unreasonable he

F

should

Hilary Term 1 Ann.

should suffer a double punishment, since he made no default, and the plaintiff made his election. Judgment ought to be *pro def'*.

Ch. Just. *Holt*. There was a time when the plaintiff could not have this action, *i. e.* while he had the distress in his custody. The defendant's plea is a total bar *ab origine*. If the plaintiff will avoid this bar, he must shew the special matter, that will intitle him to revive his action, and that he has not done. To the objection, that he has not pleaded *& adhuc detinet*, I answer, that the bar is good to a common intent, and the plaintiff ought to shew how the distress was lost: For it must be presumed he can give the best account of it; and perhaps he put it into a pound that was out of repair; but whether in a private, or a *publick*, or common pound, it matters not; for the law * has not appointed any such thing as a *common pound*. They are only by the agreement of lords and tenants; and so are haywards and keepers of pounds. The distress is for the benefit of the distrainer; wherever he impounds the pound is his, and he only can have the *parco facto*; and therefore the keeping the distress is at his peril. In the replication the plaintiff ought to shew what became of the distress: It might escape through his neglect, tho' *contra voluntatem*. Had the pig died in the pound overt, the act of God would have revived the action. As to the case of a replevin, it is not enough that it be good to a common intent: For the rule is, that replevin must be good to a certain intent in general, but a bar may be good to a common intent.

* P. 24.

Quære de hoc, and if not an article of the lect, to inquire if the common pound was out of repair.

Yelv. 148.

So judgment was *pro def'*.

Cutting *versus* Wilkins.

Error.
Several counts, one is ill; if damages are intire 'tis ill *in toto*.
1 Salk. 24.
7 Mod. 154.
Holt 273.
Lil.entr. 227.
S. C.

(2.) **T**HE plaintiff in the original action counts upon a note payable to him or order, according to the custom of merchants; and further counts upon an *assumpsit* for monies received to his Use. Judgment by default and several damages; but an entire judgment *quod recuperet dampna prædicta*, whereupon error was brought.

The defendant in error, to support the judgment, insisted, that tho' the action, according to the custom of merchants, does not lie in this case, yet the damages being several, and judgment *quod recuperet dampna prædicta*, it shall be taken as a several judgment, and not joint.

And therefore if judgment be reversed for the damages given on the bad count, yet it shall stand for the rest; and insisted on the case of *Miles and Jacob*, *Hob.* 6. *Cro. Jac.* 343. 1 *Roll.* 177, 3. And also the case of *Reymer and Grimston*, *Moor* 708. which are express in point.

The

Hilary Term 1 Ann.

The plaintiff in error insisted, that the first count was not good; for that there was no consideration, according to the cases of *Clerk and Person*, and *Goddard v. Smith*, adjudged in this court. 2 Salk. 456. 2. 6 Mod. 261.

* And as to the point, tho' the damages are several, the judgment is entire, and must be reversed in the whole; and denied the authority of *Miles* and *Jacob*, in *Hob. 6.* which has been contradicted by many judgments since; as *Cro. Jac. 424.* *Lloyd and Pearce*, 1 Roll 775, 4. 1 Keb. 232. *Styles* 121, 125. 1 Vent. 27, 39. *Gregory v. Eads.* And the plaintiff ought to have remitted his damages, on the insufficient count, according to 2 *Saunders* 379, 380. * P. 25.

The court were of opinion to reverse the judgment *in toto*; and denied the authority of *Miles* and *Jacob*, in *Hob. 6.* For the judgment being entire, cannot be reversed in part. And judgment was reversed *nisi*.

Pengelly Serj. *pro quer' in error'.*

Weld Serj. *pro def'.*

The Queen *versus* Whistler.

(3.) CONVICTION before a justice of peace on the stat. 3, 4 W. & M. c. 10. Setting forth, that the defendant was *illicite & injuste auxilians* to one *Rolf*, in killing five deer, by persuading and exciting the said *Rolf* to hunt and kill the same, by lending a dog to hunt and kill the same, and a horse to bring them away, *contra formam statuti.* Aiders, accessory, felons within the statute against deer-stealers. 2 Ld. Raym. 842. 2 Salk. 542.

7 Mod. 149. Holt 215. S. C. Fost. cr. law, *sparsim.*

The question was, whether the defendant was an aider and abettor therein, within the intent and meaning of the statute. And if the Words *aiding* and *abetting* were not in the statute, whether the defendant would not be a principal. Note; Where an offence is made felony by statute, accessories are intended, tho' not named.

Adjudged by *Powis*, *Gould*, and *Powell*, to be guilty within the statute, against the opinion of *Holt* Ch. Just.

Gould held aiders and assisters therein to be the same as aiders and assisters thereto; and from the preamble of the act inferred, that the defendant was within the meaning of the act; and that aiding and assisting ought to be taken in the largest sense, being a remedial statute.

Obj. That aiding and assisting (therein) must be in the fact. Aiding before the fact is inciting, but not assisting, &c.

* *Answ.* Aiding may be before; as in 12 Rep. 81. He that gives his consent to a trespass is a principal, and so an aider in the fact. So he that incites, is aiding, in making false money, is guilty of high treason; and *particeps criminis* before the fact. * P. 26.

But

Hilary Term 1 Ann.

But if the word *aiding* was out, yet he that aids before the fact is a principal, being only a trespass. 13 H. 7. 12. Upon the statute 23 Ed. 1. whereby it is provided against trespassers in parks, that if any be thereof attainted, great amends should be awarded; and he shall have three years imprisonment, &c. Here commanders are not mentioned, but they are adjudged trespassers.

Powis. I think all persons aiding and assisting, tho' not present, are within the statute. By 3 Ed. 1. c. 20. *De malefactoribus in parcis*, it was enacted, that the party should make amends, suffer fine and imprisonment, and find sureties; yet I do not take aiders were within that statute. But the words *aiders* and *assisters* are in this statute. But if those words were not there, the defendant would not be in the statute, because it is a penal statute, and not to be extended further than an easy interpretation will bear: Yet I think it shall be extended further than to those present; for if a man persuades to kill, and lends dogs and horses, and they are used accordingly, he is aiding therein. 2 Inst. 182. says, the word *aider* may comprehend all persons encouraging, tho' not present. Cro. Car. 473. Case upon the statute 39 Eliz. which takes away clergy from those that break a house, and steal above the value of 5 s. One gets by a ladder into the house, and the other only stands upon the ladder, but does not go in, it is resolved, that clergy is not taken from him that did not enter the house: But that comes not to this case, the word *aiders* not being in that statute. There are also several statutes wherein aiders are mentioned; and yet not construed to extend to those that are absent; but they are answered by distinguishing betwixt acts relating to felony, and acts that relate to other crimes. Those that relate to felony are taken strictly in favour of life; and also because it would otherwise confound the species of crimes, and make accessories and principals the same.

* P. 27. For that an accessory * may be in felony, but in trespass all are principals. The preamble of this act makes it appear to be a remedial act; and none of the former statutes having reached to this case, therefore the very words *aiding* and *assisting* were put in to reach the very mischief mentioned in the preamble.

Powell held it to be a good conviction. An objection has been made that this is a penal law, and the penalty is not annexed to the offence, but to the person of the offender, and their aiders and abettors therein; and thence it was urged, that he who is not present, but incites others to do the fact, is not within the words of the statute; but if it had been annexed to the offence, it would have extended to all that were abettors thereto, as well as therein. *Answ.* I shall not urge it from the preamble, it being a penal statute, and not to be expounded by equity; but I think he is within the letter of the statute, he is an aider therein as much as if he were present at the fact. Where a felony is made

Hilary Term 1 Ann.

by act of parliament, there will be accessories both before and after the fact. *Westm. 2. ca. 34.*

If a man commit a rape, he shall have judgment of life and member; nothing can be more penal than that, yet no body doubts but aiders are ravishers; and a woman has been for that reason adjudged a ravisher. 3 *H. 7. c. 2.* The statute *de malefactoribus in parcis* is a penal law. The words are trespassers in parks; and the first question that arose on that statute was in 33 *Ed. 1. fo. 11.* And there it was adjudged to be intended only of misfeasances in hunting, and not taking away cattle. Then came another case, 5 *H. 5. fo. 1.* Where the jury found that the defendant did break the park in order to hunt, but he killed no deer; and yet adjudged he was a hunter within that statute. 13 *H. 7. 12, 13.* Another action was brought on that statute, and it was adjudged, that requesting another to hunt was hunting himself, though that was a penal law. In felony, the procurer would have been an accessory, and why not in a misdemeanor. The case of *Evans and Finch* seems only to go on this distinction, where clergy is taken from the offence, and where from the party * offending. For where it is taken from the offence, it is taken from all that aid thereto; but if taken from the person entering into the house, that case says, it shall not be taken from the aider or assister. But that was a case in favour of life, and I know not whether it will be a case to rule others by.

Cro. Car.
473.
1 Jon. 394.
S. C.
* P. 28.

Holt Ch. Just. differed from the rest. A penal statute is not to be expounded by equity; but you must adhere to the words, tho' the fact may be within the reason of the statute, and of as heinous a nature as that intended to be punished.

That this is a penal statute is without all question, for there is a penalty. And the trial is put out of the common way by *Magna Charta*, by the *pares* or peers; and this being subjected to a private jurisdiction, before a private justice in his house, or chamber, we ought to adhere strictly to the letter.

Since then the preamble is not sufficient to bring this man within the penalty, there are no words in the statute that can do it. For tho' in the preamble of the statute there is a mischief recited, which is combining and confederating, yet there are no words in the statute, which inflict a penalty on combining and confederating.

Then consider the words of the statute, and they are aiders, abettors and assisters therein; not aiders, &c. thereto, but in the fact. A man lends his horse and dogs to hunt, he is an aider thereto, but he does not assist in it. If the law takes away clergy from him that shall commit murder, &c. aiders, abettors and assisters, yet you will not take it from accessories. It is observed, that this is of an inferior nature to felony, and is only a trespass: It is true, if the statute had inflicted

Hilary Term 1 Ann.

* P. 29.

the penalty, under the name of a trespass in parks only, then the commanders and abettors before, as well as those present, would have been comprehended; because they are by law trespassers. And the statute *de malefactoribus in parcis* makes it penal; not because it is done in a special manner, but because it is a trespass in the park. But here the statute sets forth the offence in particular circumstances; * and the penalty is inflicted, not as it is a trespass at large, but as it is so distinguished. As to the case of *Evans and Finch*; that the statute takes away clergy from him that breaks the house, and takes away to the value of 5 s. Two go together, one breaks the house, and the other stands upon the watch, they are both principals in this; but clergy is taken away, not on account of the felony only, but on account of the felony with these circumstances of entering and taking away. But if clergy be taken away from burglary, it is not only taken from him that breaks, but from him him that stands by; and it is taken away from all that are guilty of that crime that is contained in the burglary. But if clergy is taken away from him that robs on the highway, and assaults in such a manner, he that stands by shall not lose his clergy. If an act of parliament makes that a felony, which was before but a trespass, the species and nature of the fact is changed: Therefore the abettors must be felons because they can't be trespassers. And so if an act of parliament should make that treason, which before was only felony, those who before were only accessaries would now become principals; because the species of the crime is changed: But this act of parliament does not alter the nature of the crime, but only inflicts a higher penalty; and therefore ought to be taken strictly in those circumstances that are prescribed: Therefore I cannot agree to extend it beyond the letter, and do think it not to be a good conviction. But judgment was entered according to the opinion of the other three justices.

• Trin.

* Trin. Term, 1703.

* P. 30.

2 Annæ Reginae in B. R.

Johnson *versus* Shippin.

(1.) **P**ROHIBITION was prayed to the Admiralty for libelling against a ship, upon suggestion, that the contract was made at land, *viz.* at *Boston* in *New England*; but it appeared the ship was so damaged by a storm, that the master was forced to hypothecate part of her for necessities taken up at *Boston* aforesaid, to supply the damage done by the stress of weather; whereupon a prohibition was refused; and resolved, that when a ship in a voyage is in distress, this court will allow the admiralty jurisdiction in case of an hypothecation; because this court cannot give the party so proper a remedy as the maritime law can. Besides, the original cause was by reason of the distress; and where shall a master hypothecate his ship, unless he does it upon land: For 'tis absurd to suppose him to meet a ship on the sea able to supply him with necessities; and what security can the master be supposed to give, unless he hypothecates the ship. For tho' the maritime law does not allow the master to sell her, yet it allows him to mortgage her for the reasons and occasions aforesaid, tho' he is no owner of her, which our law is absolutely a stranger to; so that should the Admiralty be prohibited, their law, *quoad* hypothecation, falls to the ground, which the court said would be a great inconvenience.

Prohibition to the Admiralty.
2 Ld. Raym. 982.
1 Salk. 35.
6 Mod. 79.
Holt 48. S.*
C. and see 6 Mod. 11, 25.
3 Mod. 244.
1 Sid. 418.
1 Vent. 32.
1 Lev. 267.
Hob. 12, 115.
2 Keb. 511, 610.

See the following case.

* Mich.

* P. 31.

* Mich. Term, 1704.

3 Annæ Reginae in B. R.

Osman *versus* Wells & al'.

Prohibition
to the Admi-
ralty. Vide
Johnson v.
Shippin ante,
p. 30. and
the case of
Hyde v. Par-
tridge post.
43.
2 Ld. Raym.
1044.
6 Mod. 238.
S. C. and see
1 Salk. 31,
33.
2 Salk. 424.
3 Mod. 244.
Sayer 127.

(1.) **M**R. Whitaker moved for a prohibition to the Admiralty, for libelling against the body of a ship in the river *Thames* for mariners wages, and that had never been *extra corpus comitatus*. The suggestion was, that a shipwright was in treaty with the captain for the sale of the ship; and as a trial of a ship, 'tis usual for the captain to go on board, and to bring mariners with him, and to employ them about the ship, and then to launch her, &c. Afterwards they disagreed before the property was altered; and the workmanship was removed from the ship, and the hull returned to the shipwright. Now the question in this case was, if 'twas within the reason and rule of mariners wages, the ship not being benefited by the mens work; and the court at first thought it somewhat difficult, and ordered it to be spoke to again this term; and then Mr. Common Serjeant *Dee* argued that a prohibition ought not to go; for that the libel was directly for seamens wages, and seven or eight of them joined in the suit; and altho' the voyage was prevented, by the disagreement between the shipwright and the master, yet upon account of the intended voyage, the seamen came in as mariners, in order to a voyage, and the disagreement between the parties shall not prejudice the seamen; for they shall not be driven to their action at law, where they must severally sue upon the contract.

* P. 32.

* Mr. *Ayres* said, if a prohibition did not go, it would be of very ill consequence to builders; but the court answered, that when the builder credited the master with the ship, he ought to take a bond to indemnify it against the mariners wages. Then he objected, that there ought to have been a voyage to be a foundation for the Admiralty's jurisdiction; because the libel says, for work done at sea. He cited a case in 3 *Keb.* 552. where a prohibition was granted for libelling against a ship, for tackle bought in the *Thames*, supposing in the suggestion *infra corpus comitatus*. But the court held that prohibition to be upon the contract,

Mich. Term 3 Ann.

contract, and not like this case. Then he cited a case in 3 *Levinz* 60. where a prohibition was prayed to stay a suit in the Admiralty for mariner's wages; upon suggestion, that the suit was founded upon a charter-party made at land, and not upon the high sea; but the prohibition was denied, the suit being for mariners wages, which accrued due for their labour done at sea, and the charter or contract made upon land was only to ascertain them: Now, tho' in this case there was no work done at sea, yet, in as much as upon the face of the libel it appeared the suit was for seamen's wages, and for the indulgence due to mariners, all the court were of opinion, the Admiralty had a jurisdiction, and so denied a prohibition; which is a stronger case than that in *Lev.* above cited.

Trevannian's Case.

(2.) **M**OTION by Mr. *Ayres* for leave to file an information against one *Trevannian*, an attorney, for assuming to himself an authority of granting replevins, whereby he, in his own case, granted a replevin of his own goods. This Mr. *Ayres* urged to be a great misdemeanor; and that to usurp an authority, as to hold a leet, and summons people in, and the like, is punishable by information, &c. But the court denied the motion at first, because there was another remedy, viz. by a *parco facto*, this being a *pound-breach*; but * afterwards they ordered him to shew cause, &c. Note; As no under-sheriff ought to practise as a common attorney, so no attorney ought to practise as under-sheriff in granting replevins, &c.

An attorney grants a replevin of his own goods, 'tis i.l. 1 Salk. 467.

* P. 33. Reg. Mich. 1654. f. 1. C. B.

Morris *versus* Spencer.

(3.) **U**PON a writ of error, the exception taken to the bail was within twenty days, but the rule was served after the twenty days past, which the plaintiff in error thought was irregular, and so did not put in better bail; whereupon the defendant in error took out execution, which on a solemn debate the court held to be irregular; and ordered this case, with the following matter, to be the standing rule for the practice. *First*, That exception to the bail in a writ of error must be taken within twenty days. *Secondly*, Before execution can go out for want of better bail, the rule ought to be served. *Thirdly*, The not serving the rule within twenty days is not material nor inconvenient; because it is only in delay of the plaintiff in error himself.

Rules about bail in writs of error. 6 Mod. 230.

Reg. Mich. 5 W. & M. Ld. Raym. 840. Barnes 211.

Mich. Term 3 Ann.

Queen *versus* Sir Jacob Banks.

New trial,
where indict-
ment tried by
proviso of the
defendant.
2 Salk. 652.
6 Mod. 245.
2 Ld. Raym.
1082.
1 Salk. 380.
S. C.

* P. 34.

(4) **S**IR Jacob Banks was indicted for an assault upon Mr. Culpepper, which was removed hither by *certiorari*: The prosecutor not carrying it down the next assizes, the defendant the same assizes carried it down and tried it, and the defendant was found not guilty. Mr. Nott moved to set aside the trial, there not having been any laches in the prosecutor. And Powell said, the trying it the very next assizes was too soon; and there could not be any laches in the queen, nor any trial carried down by *proviso* against her: But the *quære* was, if the attorney-general by his warrant, giving consent to a trial at *nisi prius*, should not imply his consent throughout. But Holt Ch. Just. said, Mr. attorney's warrant was only a general warrant to * try it at *nisi prius*, and was more of course, than upon inquiry into the merits of the cause. And Mr. Attorney said, he was no otherwise concerned than to give the same general warrant he did in all cases. And Holt said, 'twas his opinion, that where a prosecutor removes an indictment, 'tis very hard the defendant should *nolens volens* carry it down the next assizes and try it, when perhaps the prosecutor cannot be ready with his evidence. For suppose 'twas for treason or felony, this would put the queen in a worse case than any subject. Powell, Rowis, and Gould agreed to what Holt said; and that none of the precedents, quoted by the solicitor-general, who was counsel for the defendant, were above five years standing, and those passed *sub silentio*; so all were of opinion, that a new trial ought to be: And Holt said, that no criminal can carry down a *venire* by *proviso*; but he ought properly to move the court for relief, in case a process hangs over his head; that the court may see if there be any laches or neglect in the prosecutor or not; and such motion they should never grant upon the first *instance* or *bearing*, but give time to shew cause. And so they set aside the trial.

See 1 Keble 215. 2 Leon. 110.

Anonymous.

In debt on
bond, pay-
ment of part
notpleadable.
Ld. Raym.
1121.
1 Salk. 180.

(5) **D**E B T upon a bond for payment of 500*l*. The defendant pleads payment of 225*l*. part of the said 500*l*. to this the plaintiff demurs; and *per totam curiam* adjudged to be a discontinuance; because he had only answered to part of the demand.

Clerk

Mich. Term 3 Ann.

Clerk *versus* Withers, Sheriff, &c.

(6.) **T**HE case was this: *A.* recovers 300*l.* as administrator of *J. S.* against the plaintiff *Clerk*, and thereupon sues out a *fi. fa.* to the sheriff of *Middlesex*, who levied goods sufficient; *A.* before the return of the * writ dies, the goods remained in the sheriffs hands *pro defectu emptorum*: The sheriffs went out of their office, and new ones were made. *Clerk* brings a *scire facias* against one of the old sheriffs in the Common Pleas, to have restitution of his goods, and judgment was there given against him; whereupon he brought a writ of error in the Queen's Bench. *Gould* said, Judgment ought to be affirmed, 1st, Because Mr. *Clerk* is discharged of the debt, for he may plead, levied, &c. 1 *Lutw.* 588. 3 *Cro.* 237. *Ibid.* 208, 209, 390. 36 *Car.* 2. *Rot.* 540. 'Tis plain, he said, the sheriff may sell the goods, tho' he be out of his office, as 2 *Cro.* 73. 1 *Jones* 386. For so soon as the sheriff has seised, he has such a property, as that he may maintain trespass or trover against the owner himself. 3 *Cro.* 639. And after a *fi. fa.* or *elegit* executed, if the plaintiff dies, the administrator, or in this case the administrator *de bonis non*, shall have the goods, or an action against the sheriff: And 'tis not like an extent, where a *liberate* must go. *Powis* agreed with *Gould*; and so did *Powell*, and said the *scire facias* did not lie; because the execution was in part executed, by levying the goods in the life of the administrator; and if one sheriff levies, the succeeding sheriff shall not go on with it, but the old sheriff: For after once goods are levied, 'tis not a *supersedeas*, but only a writ of error, can stop the completion of the execution: Besides here is no further award of the court; for a *venditioni exponas* is no award of the court. Then if it be asked, what shall become of the money when 'tis brought into court? It shall be as money recovered in the intestate's life-time, and shall go to such person as the court shall be apprized has right to it, by administration *de bonis non*, or otherwise.

Holt Ch. Just. was of the same opinion. For no *scire facias* lies after seizure; nothing else is to be done by the sheriff to the plaintiff, but to bring the money into court at the return of the writ; and this he may do, notwithstanding the plaintiff's death, if the goods were seised in his life-time. Then if after seizure the sheriff is out of his office, yet he is bound to make sale of them; and to * say they are in his hands for want of buyers, is * P. 36. not a discharge but an excuse only: For he has an authority to sell without a *venditioni exponas*, which is to compel him to do it. And the proper remedy is by *distringas* to the new sheriff, to distrain the old one to sell; (34 *H.* 6. 36. is the very precedent,) and shall return issues upon him, if he does not. Now

The sheriff that begins an execution shall end it. 1 *Salk.* 322. 6 *Mod.* 290. *Ld. Raym.* 1072. *Holt* 303. 646. *S. C.* * P. 35.

See 2 *Cro.* 515. 1 *Sid.* 407, 99.

Mich. Term 3 Ann.

1 Cro. 166. if a sheriff had an authority, without a *venditioni exponas*, 'tis
 2 Roll. Abr. unreasonable to force him by a compulsory writ to do it. An-
 491. other sort of *distringas* is in *Rastal's Ent.* 164. If a sheriff re-
 2 Vent. 439. turn goods to a value, and then they are lost or rescued, he is
 Dyer 186. bound to make them good to the value returned, and debt lies
 Noy 73. against him, as in 2 *Saunders* 343. Before sale the defendant is
 1 Sid. 29. actually discharged; for the goods are taken in lieu of the debt,
 1 Bulstr. 79. and the plaintiff has no remedy but against the sheriff.
 Barnard. K.
 B. 81.

Where a *scire facias* or extent is sued out, and before inqui-
 sition taken the plaintiff dies, there, upon the return of the extent,
 the administrator *de bonis non* shall not have a *liberate*; but other-
 wise if he dies after inquisition taken. Whereupon judgment in
 the Common Pleas was affirmed.

Cragger *versus* Glover.

A prisoner discharged on the late statute, and after arrested for a debt of above 100*l.* due before the discharge, must find special bail.
 6 Mod. 22, 301.
 1 Salk. 345.
 2 Salk. 521.
 3 Salk. 56.
 2 Ld. Raym. 1088. S. C.
 * P. 37.

(7.) **HOLT** delivered the opinion of this court, and also of the judges of the Common Pleas, whom he said he had consulted in the following case, which was this; *J. S.* is in gaol for 20*l.* and no more, and is discharged by the act of parliament, 2 *Ann.* Then after such discharge he is arrested for a debt of above 100*l.* due before the discharge; and the question was, If he should be discharged again without special bail? He said it seemed doubtful, because of the words in the statute, *viz. for any debt whatsoever.*

But then the *proviso* is to be considered, which is, *provided that no man shall be discharged by virtue of this act, if he stand charged and be indebted above 100*l.** Now 'tis objected, that this shall be applied to the first discharge only: But he said, it ought to be applied to the second * discharge as well as to the first; for he, that is a second time discharged, is as much discharged by virtue of this act, as he that is discharged the first time. Besides, 'twas the intent of the act, that no man shall be discharged that owed above 100*l.* Nor can the discharge of the other debts be a discharge in this wherewith he was never charged.

Hil. Term, 1704.

3 Annæ Reginae in B. R.

Green, Executor, *versus* Crane.

- (1.) **A**CTION on the case brought by an executor, upon several promises laid to have been made to the testator. The defendant pleads the statute of limitations; upon which issue was joined: It appeared upon evidence, that the testator had been dead seven years before the action was brought: But the executor gave in evidence, a promise made to himself within one year, which was the point saved at the trial: A verdict was given for the plaintiff; & *per totam curiam*; although the owning of the debt is a continuation of it, and takes away all presumption of its having ever been paid, and consequently brings it out of the statute, yet this verdict did not maintain the issue; and was set aside, because the promise, being made to the executor, could not be made to the testator *infra sex annos*.

1101. 1 Salk. 28. 6 Mod. 309. S. C. The plaintiff in this case should have replied the special matter. Vide 2 Salk. 421. Carth. 337.

Promise laid as made to the testator, who had been dead seven years; the defendant pleads *non assumpsit infra sex annos*; the plaintiff proves a promise to himself within the time, this does not maintain the issue.

2 Ld. Raym. the special

* Blackmore *versus* Titherly.

* P. 38.

- (2.) **A**CTION of assault and battery; the defendant pleads no assault, &c. *infra sex annos*, which by the statute is limited to four years. The plaintiff demurs; the defendant joins in demurrer; and *per totam curiam*, judgment for the plaintiff. For this was an argumentative plea, *viz.* That what was not done within six years, could not be done within four years; and if they had joined issue, and a verdict had been, that it was within five years, the court could not have given judgment for the plaintiff: And should such argumentative pleas be allowed or countenanced, they would inveigle the courts in their judgments; and therefore 'twas resolved, that the plea of the statute of limitations should be precise and direct; for the court said, there was no such statute as to bar an action of assault and battery not done *infra sex annos*; but the statute is express *infra quatuor annos*, &c. Whereupon judgment was given *ut supra*.

Statute of limitations pleaded argumentatively. 2 Ld. Raym. 1099. 2 Salk. 423. 6 Mod. 240. S. C. 2 Show. 493. 3 Mod. 110.

Hilary Term 3 Ann.

Wangford *versus* Wangford.

Obligee makes the obligor executor, who acts, but never proves the will;
Q. If a release of the debt?

1 Salk. 299.

3 Salk. 162.

Holt 311.

S. C.

* P. 39.

(3.) **E**RROR on a judgment given in the Common Pleas; and the case was in short this: The obligee makes his obligor executor, who accepts of the executorship, by his administering, but dies before probate; and if this is a release of the debt was the question. Judgment in the Common Pleas that it was; upon which error was brought here, where the judges *seriatim* gave their opinions, that the judgment in the Common Pleas was well given.

And first, *Gould* said, It must be agreed, that if the executor of the obligee had proved the will, it would have been a release: And urged, that the non-probate * would not alter the case; and he relied much upon these cases, which he said were strong in point. 20 *Ed.* 4. 17. a. 21 *Ed.* 4. ca. 4. fo. 3. and *Plowd. Com.* 184.

Again, he said, he is executor, to all intents and purposes, before probate, save only to the prosecuting of actions; and by his once taking upon him the administration he has so bound himself, that he can never after refuse. 1 *Mod. Rep.* 213. 5 *Rep. Middleton's case*. But if an obligor executor would refuse before the ordinary to accept of the executorship, without having before meddled, then he held, the act of the testator would not, *volens volens*, amount to a release.

Powis said, An executor has before probate a very large and ample power; and cited *Middleton's case* in 5 *Rep.* For before probate an executor may release a debt, which an administrator cannot do; for the executor commences by an act temporal, originally by the will, but an administrator commences from the letters of administration, and so the diversity. *Plowd. Com.* 280. 1 *Roll's Abridg.* 9. 7. 36 *H.* 6. 7. 1 *Mod. Rep.* 213. *Dyer* 367. *Hutt.* 30. & 31. *Cro. Jac.* 614. 1 *Vent.* 303.

If an executor refuses to accept the executorship, and is a debtor, the administrator may sue him; for he said, it was no release of the debt, contrary to the sudden opinion of *Twisslen*, in 1 *Vent.* 303. But he took a difference between an actual refusal, and not meddling with the executorship for a time: For if *A.* makes a deed to the use of *B.* 'tis *A.*'s deed till *B.* refuses. 3 *Rep.* 26.

Powell first of all cited the case in 21 *Ed.* 4. 3. and said, abundance of cases agree, that if the debtee makes the debtor executor, who proves the will, the debt is for ever gone, because it is the very act of the testator himself; and therefore if it is only suspended, it being his act, 'tis for ever gone. Now if the proving the will is the only cause, then he said, 'tis very strange

Hilary Term 3 Ann.

none of the books should take notice of it. But the reason given in them is, that a personal action, once suspended, is for ever gone. But 'tis plain the right of action is in him before probate, and therefore he may release: Nay, he may * bring an action, * P. 40. tho' he cannot go on with it, till he has obtained the probate under seal to produce in Court. 5 Rep. 28. 1 Roll's Abridg. 917. Hutt. 30.

If the ordinary grants letters of administration to the obligor, it will suspend the action, but nothing further; because 'tis not the act of the obligee himself. If an executor dies before probate, his executor shall not be executor to the first testator. And he thought the cases in *Dyer* 372. 1 *Leo.* 275. and *Plowd. Com.* 290. were the first that allowed of this; and he said, they were rather in compliance with the Spiritual Court than lawful: For an executor has an authority given by the first testator, and then what authority have the Spiritual Court, or the first executor, to make an executor to the first testator. Now as to the matter of the release, he said, it could not operate as such; for then it would not be assets, but rather as a legacy; and yet it would not be assets to legacies, except part of it was especially appointed to be paid away, for then it shews the intent. 1 *Roll. Abr.* 920, 921. For a will cannot be said properly to be a release, but a gift, and so must be liable to debts. If the obligor makes the obligee executor, who accepts it; now if there is assets, he may retain; if there is none, he may sue the heir, and so no suspension of his debt; for if his debt is extinguished, 'tis upon presumption of his being satisfied by retaining. *Plowd. Com.* 185.

Vide Palmer
156.
Yelv. 160. an
express case
in point.

Lord Ch. Just. Holt said, before he gave his reasons for affirming the judgment, he would first give answers to three objections started at the bar. The first was, when a will is made, and the executor dies before probate, the Spiritual Court grant administration *cum testamento annexo*, without taking any notice of the administration by the executor. The second objection was, that 'tis the foundation for granting administration to the next of kin, that the executor died *ante onus testamenti super se assumpsit*. The third objection was, that such executor, making his executor, he cannot be executor to the first testator; but administration must be granted *cum testamento annexo*. And as to the first objection, he said, the Spiritual Court could not take notice of what an executor did, tho' all his acts were valid before probate. As to the second, that he died *ante onus testamenti super se assumpsit*; he said, that must be taken in a restrained sense, viz. *ante onus*, &c. taken upon him in their court. And as to the third objection, that an executor dying before probate, making his executor, that he shall not be executor to the first testator; the reason of that is, because no man can prove the will of another, who is not named executor, &c. in the will. *Cro. Jac.* 614. * P. 41.

His

Hilary Term 3 Ann.

His first reason for affirming the judgment was, that by making him executor, he is entitled to receive and pay money due before probate; and being bound to receive and pay, he cannot pay himself, and so it operates as an extinguishment. But this rule is subject to several limitations; as if the obligor makes the obligee executor, for he is not bound to pay unless he has assets, and then he may retain for his own debt. 11 H. 4. 83. Cro. Car. 372. Hil. 24 & 25 Car. 2. Cock and Cross. Suppose the obligor takes administration, he has as much right to receive as the executor; but then the one is the act of the creditor, the other of the ordinary, which is but a naked authority without any interest; as in 8 Rep. Sir John Needam's case. If the executor of the obligee take the obligor to husband, this is no extinguishment. Co. Lit. 264. But if the obligee takes the obligor to husband, it is; because 'tis in vain for the husband to pay money to his wife. But when the husband pays money to the wife executrix, there it shall not be the husband's money, if she dies, but the administrator's *de bonis non*. Another reason is, because 'tis assets; for it amounts to a payment, and enures as a release thereupon, contrary to *Powell*, and is as much as if he had received so much money, and therefore is assets in his hands. Another reason is, by his accepting the administration he becomes a compleat executor, tho' he dies before probate, and all the goods of the testator are, by act in law, vested in his possession, for which he may bring trover: Nay, he may bring an action of debt before probate, and tho' it should appear, that the probate * bears date after the bringing the action, yet 'twould be well enough. 1 Roll. Abrid. 917. But in case he had gone into the Spiritual Court and refused, then it would not be a release; for no one shall be compelled to accept of a release, no more than of a deed: For the obligor may plead *non est factum* to the bond, but till actual refusal he is an executor, tho' he dies before probate. 20 Ed. 4. 17. 21 Ed. 4. 3. *Hardress* 111. and the Lord *Petre's* case, which *Holt* said was argued and resolved in *Serjeant's-Inn*, about four years since.

* P. 42.

Easter

Easter Term, 1705.

4 Annæ Reginae in B. R.

Anonymous.

(1.) **I**F a licence is granted to a man to use my ground or my yard, he thereby has an interest in it; so that the licence is not revocable, but it amounts to a lease at will; and this seemed to be the opinion of the court, and that he thereby had such a possession, as not to be turned out by revocation, but by an ejectment. *Qu.*

Licence amounts to a lease.
2 Salk. 588.

Anonymous.

(2.) **HOLT** said, the justices of peace, in the case of forcible entries and detainers, ought to adjourn their courts, and give the parties an opportunity to traverse * the force, or else the party has no remedy but by *certiorari*; and every inquisition is traversable by the statute of *Westm. 2. c. 13.* But generally the justices inquire into the possession only, and award restitution, without trying the forcible detainer, or entry, upon a traverse. *Note*; A tenant at will cannot justify a forcible detainer, till he has been three years in possession, but he ought to quit possession, and apply to the justices for a restitution upon the forcible entry.

Justices of peace's power in forcible entries, &c.
1 Salk. 353.
2 Salk. 588.
3 Salk. 170.
Holt 324.
* P. 43.

Cockcroft *versus* Smith.

(3.) **HOLT** said, if a man strike another, who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case, *sen assault* is no good plea; neither ought a man, in case of a small assault, to give a violent or unsuitable return; but, in such case, plead what is necessary for a man's defence, and not who struck first; tho' this he said has been the common practice,

Sen assault de mesne, where a good plea, in *mayhem*.
post. 52.
2 Salk. 642.
6 Mod. 230.
263. and
Holt 699.
S. C.
1 Ld. Raym.
177. S. C.
cited Sid.
246.

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tice, but this he wished was altered ; for hitting a man a little blow, with a little stick, on the shoulder, is not a reason for him to draw a sword and cut and hew the other, &c. In this case, *Cockcroft* in the scuffle ran his finger towards *Smith's* eyes, who bit a joint off from the plaintiff's finger ; and if this was a proper defence, for the defendant to justify in an action of *mayhem*, was the question.

Hyde *versus* Patridge.

Seamens wages. See now the stat. for amendment of the law, (4 & 5 Ann. c. 16.)
 2 Ld. Raym. 1204.
 2 Salk. 424.
 3 Salk. 227.
 and Holt 428.
 S. C. but see Ld. Raym. 934.
 3 Salk. 227.
 and 6 Mod. 25.
 * P. 44.

(4.) THE case was ; if the statute of limitations extended to a suit in the Admiralty for seamens wages ? Mr. Serjeant *Darnel*. That it did not ; because it proceeded according to the civil law : And likewise, that it ought not to be construed according to equity, but to the letter ; and in the statute there is no mention of this * court ; and it restrains mens liberty that they had at the common law, and therefore such statutes ought to be taken strictly. *Plovid. 54. Hutt. 109. 2 Vent. 345. Cro. Car. 539. 1 Mod. 245, 246.* Another reason he said was, he supposed the law-makers very well knew that there was a remedy, not only at our law, but in the Admiralty too ; and therefore, had they intended this statute should have extended to the Admiralty, they would have mentioned it, especially since it proceeded by another law ; and therefore by implication it ought not to extend to it. *1 Roll. Abr. 531.*

Mr. Common Serjeant *Dee, contra*. For that tho' the cause is marine, yet 'twas as much as if the suit is for a contract made at land ; the common law courts must take notice of it ; the statute he said says, *any suit*, and this proceeding can be no other than a suit ; and the statute is pleadable in Chancery.

Holt Ch. Just. said, if the contract is made *super altum mare*, the statute does not extend to the Admiralty ; but if it be made upon the land, it does ; and they have a necessary jurisdiction ; because the ship is liable, by the marine law, till the owner comes in, and gives security to abide the judgment ; and then the ship is discharged, and the action becomes personal : *Powell* said, the common law's indulgence to the Admiralty is of so long standing, that it is become a right ; and it would be very hard to make this statute not to extend to any suit but at common law. *Holt* said, an action of debt on an award is out of the statute : But then the action must be brought for the money awarded, and not upon the *assumpsit* to stand to the award. The reason a legacy is out of the statute is, because it may be stopt till debts are paid. But now by the statute, for the amendment of the law, 4 & 5 Ann. the suit in the Admiralty must be commenced within six years after the cause of such suit shall accrue, (with a saving of incapacities, &c.)

See the statute.

Anonymous.

Easter Term 4 Ann.

* Anonymous.

* P. 45.

(6.) **A** Man brought to this court by *hab. corp.* upon a commitment by the justices of peace, who have cognizance of the cause, is not bailable, till the order is qualshed; because till then he is in execution.

Commitment of justice of peace is in execution. Post 59.

1 Sid. 286.

2 Keb. 43. 1 Salk. 106.

(7.) In the Common Pleas, upon a recognizance entered into there, a *fieri fac.* or *elegit* may go, but no *capias* lies; but otherwise in this court a *capias* lies, for here the bail is body for body.

Recognizance.

1 Rol. Abr. 897.

(8.) Mr. Serj. Darnel moved to amend a declaration, which was carried down to *Winchester* to be tried, but finding something necessary omitted in it, did not try it; he said, it not being a record, but only a paper, he prayed it might be amended upon payment of costs; which was granted *nisi causa.* Absente Holt.

Declaration amended after issue.

3 Lev. 347. Barnes 4to.

edit. 12, 488.

(9.) Mr. Serjeant Hooper moved in arrest of judgment, on a verdict upon the statute of the 23 of *El.* for not coming to church for eleven months: His exception was, that the statute requires the prosecution thereon to be brought within a year and a day, but this action was brought three weeks after the year, and the verdict was for the whole: But Mr. Justice Powell told him, he put them, *i. e.* the other side, in mind of curing this mistake, they not having entred up their judgment: For he said, if they entred up their judgment for no more than what was within the time limited by the act, *viz.* for no more months than were within the year; then it would not be error.

Statute of conformity.

23 Eliz. 2.

1 Salk. 166.

6 Mod. 183.

Holt 141.

(10.) Holt said, If a farm is out of repair in the life of the ancestor, and after the heir brings an action, he shall recover damages for the whole time: But the heir ought not to alledge a breach in the ancestor's time, because that belongs to the executor.

Not repairing a farm.

2 Ld. Raym. 1125.

1 Salk. 141.

Holt 178.

S. C.

2 Lev. 26.

* (11) To put a matter of law in issue to a jury is void. But Holt said, it would be helped by a verdict; where an issue is wholly immaterial, then there must be a re-pleader.

* P. 46.

Re-pleader.

6 Mod. 2.

&c.

(12.) If a parson is instituted only, he cannot have an action of trespass till induction. But Holt said, he is intitled to the spiritual profits, as oblations, &c. before induction: He is likewise liable to be sued in the spiritual court before induction, if he neglect the cure; but he cannot sue for great tithes before induction, for they are temporal.

Trespass by Patron till Induction.

Co. Lit. 344.

3 Blac. Com. 391.

(13.) If a bishop grant a patent to a man to be vicar general, wherein he reserves a jurisdiction to himself; it seems to be repugnant

Vicar-general not restrained.

Post 62.

Easter Term 4 Ann.

nant and void. So where a bishop grants his chancellorship with a reservation to himself of institution and induction. And *Holt* said, what cannot a vicar general do? For if he is restrained, he is not a vicar general.

Colonel *Layton's* Case.

Commitment
by ld. mayor
for forcible
entry in the
Fleet prison.
Post 59, 236.
2 Vern. 173.
Salk. 106,
353, 450.
S. C. and see
1 Sid. 286.
2 Keb. 43.
3 Salk. 170.
6 Mod. 95.
Ld. Raym.
1514.
2 Str. 794.

* P. 47.

(14.) **H**E was brought into court by *bab. corp.* having been committed by the lord mayor of *London*, on his own view, for a forcible entry into the *Fleet* prison, and for a forcible detainer thereof. The title *Layton* claimed by, was, that this prison was, by a judgment of this court, seized into the Queen's hands, under whom he claimed. Sir *James Montague* excepted, that it did not appear that it was done by a justice of the peace; for the subscription was by *Owen Buckingham* mayor, and did not say a justice of the peace. *Raymond*: 'Tis necessary that the person that commits for a forcible entry ought to entitle himself to a jurisdiction, by subscribing himself a justice of peace. *Lamb.* 160. 2dly, A justice cannot set a fine by virtue of the statute, but ought to refer to the quarter-sessions. 2 *Cro.* 41. *Keilway*. What power the justices * have ought to be executed *eo instante*. Another exception was, that 'twas said to be within the liberties, and not within the city itself; for the lord mayor has not jurisdiction every where within the liberties. Mr. Attorney, in answer to the objection, that the lord mayor did not shew himself to be a justice, said the court would couple the warrant to the conviction; for that, he said, was the reason of removing it hither by *certiorari*; whereby it would appear to the court, that there was a judgment to found the warrant of commitment upon. Serj. *Broderick*, That the lord mayor of *London*, *virtute officii*, before any acts of parliament for justices of the peace, was a conservator of the peace; and thereof the court would take notice, and also upon account of the stat. 8 *H.* 6. which makes all mayors justices of the peace; and the warrant has a reference to the conviction; and so long as the conviction stands, the warrant shall be supplied by reference to that: By the record it appeared to be done all *eo instante*; and so the objection is answered. Mr. *Ayres*, This is a commitment in execution. 15 *R.* 2. is founded upon 5 *R.* 2. and so is 8 *H.* 6. *Holt* said, the justices of peace may set a fine; but he ought immediately to commit him, where by his own view he finds a forcible detaining; and then, as he is a judge of record, he may adjourn his court, and then set a fine upon him, and commit him in the mean time. As for the objection of his signing mayor and not justice, 'twas sufficiently answered, that that defect was supplied by the statute, which makes all mayors justices; *per totam curiam*. *Holt* said, upon a
a view

Easter Term 4 Ann.

a view of forcible detainer, the party may plead, that he and his ancestors have been in peaceable possession three years; and the justice ought to accept the plea, and try it as well in this case, as in the case of restitution, and ought to stop restitution till such issue is tried. By the common law, he said, a man might defend his house by force and arms, for 'tis his castle; but these statutes restrain him. *Adjournatur.*

* (15.) A prohibition to the spiritual court was refused for calling a woman *brandy-nosed whore*. Mr. *Earl* insisted upon several authorities, that calling a woman whore was only words of heat; but the court were unanimous, that, notwithstanding the former practice, a prohibition should not go, for that it is a great defamation.

* P. 48.
Scandal.
Ld. Raym.
1101, 1136,
but see 1 Jon.
44. & Holt
593.

Smith *versus* Goffe.

(16.) **A** Declaration on a special promise, that he would pay so much money, in consideration the plaintiff would deliver up such a bond; and avers, that he did deliver up the bond. Mr. *Ayres* objected, that he did not set forth that he gave notice to the defendant; and that it was not said to whom the bond was to be delivered; he cited *Cro. Car. 577. Cro. El. 229.*

Special promise to one, on doing an act to a third.
2 Ld. Raym.
1126.
2 Salk. 457.
S. C. Cro.
Jac. 432.
Hob. 51.

Sir *J. Montague, cont.* He cited 1 *Lev. Price and Evans. Cro. El. 97.*

Holt. A general promise, to pay money when a bond is delivered up, must be intended to be delivered up to the obligor, tho' he is a third person; and the defendant ought to take notice of the delivery, for he might have applied to the obligor to have had notice: For where either party might have had notice by their own inquiry, notice is not necessary. *Holt* said, in case of marriage of one self, notice need not be averred; because marriage is of it self notorious. But *Powell* doubted.

Notice.

Mayor, &c. of Winton *versus* Wilks.

(17.) **O**N a special verdict, wherein a custom was found to restrain any stranger from setting up a trade, unless he was qualified according to the custom, &c. 'twas questioned, if such a custom be good in any other city than *London*; it being a custom restraining the liberty of the subject in a matter so beneficial to the kingdom * as trade is. *Darnel* cited *Palmer 2, 3, 4, 5. 2 Roll's Rep. 203. 8 E. 3. 37. Hob. 85. Moor 871. 4 Med. 421.*

Custom in restraint of trade, ill.
2 Ld. Raym.
1129.
1 Salk. 203.
6 Mod. 21.
2 Holt 187.
S. C.
* P. 49.

Mr. *Raymond*, That this custom is not good, cited 8 *Co. Waggener's case. 11 Co. 53. 2 H. 6. 5. pl. 26. Cro. Jac. 196. 210. 2 Roll. 277. 1 Lutwich 562.* He insisted principally on *Waggen-*

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er's case; and that great stress was laid on confirmations of acts of parliament in that case. 9 Co. 59. 1 Lev. 262. Cro. El. 185, 803. Holt. Whenever a town is incorporate, it is as well for the benefit of the inhabitants in general, as a freeman, where it is for the benefit of a trade; and a by-law will extend to both. The city of London has a power to qualify persons, and to oblige infants, if they bound themselves, to stand to their indentures, notwithstanding their non-age; but there is no such custom any where else; which occasioned the statute of 5 El. which binds infants. Note; The court seemed to be of opinion, it was a bad custom. But judgment was given upon the defect of the declaration; for that the plaintiffs had not entitled themselves to the action. And justice Powell said, most of the corporations in England, that are by prescription, assume this custom. But he gave no opinion of it.

Sir William Drake *versus* —

No special
bail in scan-
dal.
Holt 640.
Reg. Mich.
1654. f. 9.
B. R.

(18.) A Motion was made for a special writ, to be had by rule of court, against a person, to hold him to special bail, for speaking very scandalous words against Sir William Drake, (viz.) *That he was a traitor, one of the 134, for bringing in the prince of Wales, &c.* But the court refused to grant it; and said 'twas refused in the Lord Wharton's case, for scandal of a peer.

Under-bailiffs not amerciable.
Bro. ret. brev.
89, 99.
Post 272.

* P. 50.

(19) Sir James Montague moved the court to amerce an under-bailiff of Westminster, for not making a return of a writ. But the court thought the motion improper. For that the sheriff is the officer of this court. The court in this case made a rule for the bailiffs to return it, * and for disobeying that, bring them into contempt.

Luttin and Benin.

No escape
can be, where
the arrest is
illegal, i. e.
out of the jurisdiction.
1 Ld. Raym.
229.
2 Mod. 195.
2 Ld. Raym.
775.
2 Salk. 700.
7 Mod. 29.

(20.) ACTION of escape against a serjeant of Wood-street counter; upon not guilty pleaded, it appeared that the action, on which he arrested the person escaped, arose out of the jurisdiction; and the process was executed out of the jurisdiction. Mr. Ayres. Where an inferior court holds plea of matters out of their jurisdiction, 'tis *coram non judice*. There is a difference between proceeding erroneously where they have jurisdiction, and where they have no jurisdiction. Cro. Car. 394. Hardres 480. That actions will lie against officers appears from the averment necessary for the officer, (viz.) that the cause was *infra jurisdictionem*, in order to justify: And if an inferior court holds plea of a matter out of their jurisdiction, all their proceedings

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ceedings are void, and *coram non judice*, and may be avoided by plea. *March* 117. 3 *Lev.* 243. But where they have no jurisdiction, no action will lie. 3 *Lev.* 234, 23. 1 *Roll's Abr.* 809. That actions may be brought against the officer, as well as against the plaintiff. 2 *Mod.* 195. 2 *Cro.* 3. Sir T. Jones 214. 4 *Rep.* 14. b. 2 *Lutw.* 935, 1516. 2 *Mod.* 30. *Cro. El.* 836. *Hob.* 267. 1 *Vent.* 86. If a man brings an action in an inferior court, as in the Star-chamber, an action will lie: And so where a man sues *coram non judice*, 1 *Lev.* 95. 1 *Sid.* 125. it not being in the ordinary way of justice. That no action of escape will lie in this case, *vide* 1 *Roll Abr.* 547. *March* 8. 2 *Bulst.* 64. 2 *Mod.* 29. Mr. Whitacre, *contra*, cited 2 *Inst.* 230. 3 *Keble.* 852. 2 *Vent.* 236. *Raym. Rep.* 189. 26 *Ed.* 3. 16. It being a matter transitory, and the court having *prima facie* a jurisdiction, no one shall take advantage of it, *Yelv.* 42. 2 *Cro.* 3. but the defendant. 2 *Bulst.* 62. And it shall be at his election to avoid it by plea or not; and the defendant in this case is a wrong-doer, and so shall not take advantage of his own wrong: He said, he was informed, that, in the city of London, they never say the cause of action * arose within the jurisdiction, as they must in all other inferior jurisdictions. A sheriff cannot take advantage of any erroneous proceedings, if he suffers an escape. * P. 51.

As to the limitations of inferior jurisdiction, *Holt* said, these three things are to be considered, (*viz.*) persons, time, and place. As to persons and place; as in the case of the *Marshalsea*, and those of the household: For in that court, they have jurisdiction only in debt, trespass, and covenant; and therefore, should they hold plea of an action on the case, 'tis plain they have no jurisdiction. And as to things, he said, the city have jurisdiction in all causes, and are only restrained to place; and therefore the defendant ought to have pleaded to the jurisdiction. For if he admits the jurisdiction, he is for ever after estopped. And an issue may be taken upon it; and if it be found to arise within the jurisdiction, judgment final ought to be given. If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged; for no lawful thing, founded upon a wrongful act, can be supported. If a justice of peace makes an order for a man to keep a bastard child, which in reality was born two days after marriage, in this case, all the officers acting under that are wrong, and they are liable; because a justice can have no jurisdiction of the thing. But in this case the court had jurisdiction of the thing, and therefore it ought to have been avoided by plea. Mr. Justice *Powell* was of the same opinion; and said, where an inferior court had jurisdiction in a transitory action, the defendant ought to plead it, otherwise *non constat*, but it did arise within the jurisdiction; and to make it *coram non judice*, it must appear that the court have no jurisdiction. *Powis* and *Gold* of the same opinion; so judgment was,

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was, that the officer was liable to the action; *nisi* the defendant shews cause within a week.

Bond dated
at B. is local.
2 Salk. 659.
6 Mod. 228.
Gilb. hist.
C. B. 84.
* P. 52.

(21.) Dating of a bond to be at a certain place, makes it local; and should the city of *London* hold plea, if it were dated at *York*, 'twould be erroneous: But the making * of a bond without dating, makes it transitory, and may be said to be made all over *England*.

Cockcroft *versus* Smith.

No new trial
in battery.
Ante 43.
2 Salk. 642.
6 Mod. 230.
263. and
Holt 699.
S. C.
5 New Abr.
249.

(22.) **M**OTION for a new trial. The case was in battery: It appeared, that the plaintiff had a material witness that he knew to be sick, and yet went on with the trial; whereas he should have paid costs, and put off the trial. *Holt* doubted if the court could grant a new trial. *Powell* said, it being in the case of battery, which might affect a man all his life, he was inclinable to grant a new trial. But it appearing he might have had another witness to the same purpose, they were unwilling to grant one. Adjourn'd.

Commitment
in forcible
detainer.
Ante 47, but
see 1 Salk.
353.
3 Salk. 170.
and Holt 324.
Hab. corp.
commitment.

(23.) Upon the statute of forcible detainer, where the justice finds it upon his own view, he must immediately commit, and cannot adjourn the commitment; but it must be done *eo instante*; as in the case of auditors on account: so if he has recorded the force: But *Holt* said, so long as the matter is under examination, he may adjourn.

Justices of
peace:
Post 59.

(24.) When a person comes to this court upon a *hab. corp.* and this court thinks fit to turn him over to the marshal, they commit him for no other matter than for the cause or causes returned on the *hab. corp.*

(25.) *Holt* said, a justice that had power to set a fine, has power to bail; for he is not obliged and bound to commit him; but after he is once committed in execution, 'tis too late to move for bail.

Changing
venue's.
Reg. Mich.
1654. and
Mich. 10
Geo. II. (c.)

(26.) If the rules for changing *venue's* extends to bills of exchange, the court doubted; but seemed to be of opinion, that they did not, for the inconvenience that might ensue. *Qu.*

* P. 53.
Judgestaking
recognizances.
2 Ld. Raym.
1460.
Difference of
freeholders
and copy-
holders.
Post 57.

(27.) *Holt* said, that by the common law, without the help of any statute, any judge, either of this court or the Common Pleas, may take a recognizance for any sum on condition: For if a man will voluntarily enter into it, a judge has power to take it.

(28.) For the nature of freehold lands, and lands held by copy of court-roll, *vide* 4 Rep. 31. 5 Rep. 84. *Ad voluntatem domini* is the distinguishing mark of a copyhold. *V. 2 Lut.* 1165, 1171. 3 Bull. 230. 2 Vent. 143. *Cro. El.* 185. As to setting forth a custom, *Rastal's Ent.* 62. 2 *Brownlow's Decl.* 96. *Cro. Car.* 418. By *Holt*. Where a custom is, that all lands

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of that manor shall pass by surrender and admittance; yet the lands may be freehold; and the manner of conveyance is customary, in as much as livery is not requisite. And he said, *The freeholds themselves can never be parcel of the manor, but 'tis the services. Quere.*

(29.) A man that claims common in another man's land, must set forth a title: But a man, that is in possession, need not set out a title.

Title of common.
4 Mod. 175,
418.
Holt 548.

Domina Regina *versus* Wiat.

(30.) **I**NDICTMENT in the county of *Sussex*; several persons convicted for killing, and being aiding and assisting to kill deer, and a warrant to levy a distress; which warrant by a clause in it was to be returned; the warrant was delivered to the defendant, who levied the money, but made no return of the warrant, which was the offence, and was removed here by *certiorari*. Sir *James Montague* for the defendant said, that the not returning the warrant is not an offence criminal to be indicted upon; and finding the money to be levied, makes for the defendant. He excepted, that there ought to have been a time and place when and where he should have returned this warrant to them, for he is not bound to travel over *England* * to find them. Again, his warrant is his justification and indemnity, in case he should be sued for a trespass. Mr. Serjeant *Broderick cont.* By the very frame and design of the act of parliament, 'tis the duty of the constable to make a return of his warrant; *vide* the statute. He said, how could the justices know how to distribute the poor's part, unless 'tis returned to the justices what money is levied. The constable is in this case made a publick officer, and 'tis a misbehaviour of him. In answer to the objection of travelling over *England* to find them, he said, justices are always supposed resident within their own counties.

Deer-stealers.
The constable
levying the
penalty, and
not returning
the warrant,
indictable.
2 *Ld. Raym.*
1189, 1478.
1 *Salk.* 380.
Fortesc. 127.
S. C.

* P. 54.

But by *Holt* chief justice, There is a difference between returning the warrant itself, and returning what he has done. The not fixing a time when, and place where, is no fault; for he should have done it forthwith, and any where within the county suffices. *Powell.* The return is necessary; because he may levy only part, and then further process should go out: For if the whole cannot be levied, then the justices must go upon another part of the act. And *per tot' cur'*; 'tis an offence indictable, for not returning what he has done. *Holt* said, if a man is under three convictions, and his goods are sufficient to answer two of them, the money shall be paid, and he shall stand in the pillory for the third: But on one conviction, if he wants but 2s. in the whole, the justices cannot take it, but he must be imprisoned, and stand in the pillory for it afterwards. *Ayres,* That

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the conviction was naught; for that it was not set forth, that the examination and oath were within the jurisdiction of the justices. He objected, that he was indicted for not returning the very warrant itself; which he said he ought to keep for his own indemnity. Mr. Attorney, as to the objection, said, that 'twas in the indictment, that he was *debito modo* convicted: Judgment was staid till the first day of next term, for the resolution of the court, when judgment was given against the defendant. *Holt* differing; not but that he said, it was an offence. But he said, in all process there ought to be a place, and a time, for the return.

Contra pacem. * *Contra pacem*, in an indictment for a non-feasance, is not necessary.
* P. 55.

Domina Regina *versus* Bafs.

Conspiracy in charging one with being father of a child, not saying bastard. 2 *Ld. Raym.* 1167. 1 *Salk.* 174. 6 *Mod.* 185. *Holt* 151. *S. C.* and see 2 *Keb.* 59.

(31.) **I**NDICTMENT for conspiracy, intending to scandalize a person, and to get money out of him, by alledging him to be the father of a child which such a woman was big with; but the indictment does not say it was a bastard-child. Mr. Serjeant *Weld.* A conspiracy to do an ill thing, where nothing is done to put it in execution, stands singly upon the intention, and is not an ill or criminal thing; it doth not appear in the indictment, that the matter of slander is false, and therefore it must be intended true. In an indictment of this nature, or in case of perjury, *falso & malitiose*, &c. do not make the charge to be false; but these words, *ubi reveri* it is not true. *Long's* case in 5 *Rep.* But *Holt* said, that case was very nice, and by his consent they should not be so nice again; and he questioned, if any one case in the law was like it. Mr. Serjeant said, *Vaux's* case was something like it. *Holt* said, If two or three persons meet together, and discourse and conspire how to accuse another falsely of an offence, it is of itself an overt-act, and is an offence indictable: So if two or three meet together, to conspire the death of the queen, yet tho' there was nothing but words passed, the very assembling together was an overt-act. 1 *Vent.* 304.

The exception the court went upon was, that it did not sufficiently appear that the charge was criminal, it not appearing the child was a bastard. Yet the court said, this exception, *viz.* the not laying it to be a bastard-child in the indictment, was *primæ impressionis*. *Powell* said, If people meet together to consult or conspire; to make it criminal, they ought to come to some resolution; then he thought, if it appeared that he repented, it might alter the case. The court took time to consider of * precedents, and see if any went upon the omission of *bastard* in the indictment.

* P. 56.

Goddard

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Goddard *versus* Smith.

(32.) **H**OLT seemed to disallow of *nonproffes* and *cessat pro-* The practice
cessus; for the proper way would be to plead not of *nonproffes*
guilty, and the attorney-general to come in and confess it. and *cessat*
And Mr. *Harcourt* said, the first *nonproffes* was in the 16th year of *processus*, dis-
Car. 2. 'Twas a doubt, if an action of conspiracy would lie approved.
upon such an acquittal, for the declaration must be, that he was 1 Salk. 21.
debito modo acquietatus. Serjeant *Darnel* said, Suppose a man 2 Salk. 456.
declares he was prosecuted, *quousque* there was an entry of a *non-* 3 Salk. 245.
proffes, would that have been good? To which the court gave no 6 Mod. 261.
direct answer, but seemed to incline that it would not; for the Holt. 497.
nonproffes is not a discharge of the crime, but only of the indict- S. C.
ment: And they went upon Mr. *Harcourt*'s rep. That they used
to indict them again, and not to proceed upon the same indict-
ment. *V. post.* 114. *Ogletborpe's case*.

Domina Regina *versus* Inhabitants of Stratford.

(33.) **E**RROR to reverse a judgment given in an indictment, Indictment.
for not repairing the highway. Mr. Raymond ex- Highway.
cepted, that 'twas not said the ways were out of repair; but that Ld. Raym.
'twas *tam angusta, fæda & lutoſa*, as to hinder the queen's sub- 1169.
jects passing: Now it did not appear but that it was antiently Fortes. 253.
so, and that it was not narrower than before; but it was not S. C.
shewn that the way was streightned, and delayed, for which the
court thought it was insufficient; but put off judgment till next
term, upon the prayer of *Nortcliff*, that he might inspect the
record. Judgment to reverse it, *nisi causa* by the last day of *Tri-*
nity term.

* Idle *versus* Cook.

* P. 57.

(34.) **A** Surrender was of a copyhold estate for life, the re- Surrender of
mainder to a man and his wife for life, and their copyhold for
heirs and assigns; and for default of such issue, the remainder life, with re-
over: The question is, what estate the man and his wife have, mainder.
there not being the words, *of their bodies*. Gould held it an estate- 2 Ld. Raym.
tail; and he said, he made a difference between a copyhold 1144.
and freehold estate, *quoad* this; he compared this to *Beris-* 2 Salk. 620.
ford's case, in the 7 *Rep.* and *Peck's case* in *Littleton's Rep.* 3 D'Anv.
He said, such issue qualify the general words. *Lit. Rep.* 347. Abr. 186. pl.
Moor 424. He took a difference between a grant to a man and 14.
his heirs, and the heirs of him. *Plowd.* 541. 1 *Leo.* 50. *Powis* Holt. 164.
held it a fee-simple. To make an estate-tail it must appear from S. C.
what body the issue must come. *Lit. sect.* 31. But in case of a
devise

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devise 'tis otherwise, because of the intention. *Hob.* 32. *Co. Lit.* 27. And being *inops consilii*, 9 *H.* 6. 25. *Cro. El.* 474. He said, in a conveyance, *de corpore* is an essential part; but there may be words tantamount. 37 *Aff. pl.* 17. 5 *H.* 5. 6. *Cro. El.* 473. *Fitz. Abr.* 743. It being an estate to the husband and wife, and their heirs, the words, *and for default of such issue*, are uncertain, whether 'tis meant the issue of both, or of the survivor; he made no difference between the limitation of a freehold and a copyhold, and cited *Cro. Car.* 367. 2 *Sid.* 41. The will of the donor is to be observed in estates-tail, but then the will must be *manifeste expressa*. In conveyances the limitation of estates have known words; and he said, it would be of dangerous consequence to allow a latitude. *Powell* held it a fee-simple; for the words were, *and to the heirs of the aforesaid baron and feme*, and *pro defectu talis exitus*. He was not for confounding estates-tail and fee; for tho' the intent of the parties might be to make an estate-tail, yet he would suffer a mischief, rather than an inconvenience. He inquired if there was any thing in this case to make it a fee-simple conditional * at common law, which the statute *de donis* has now made a fee-tail; for this statute was made to prevent the abuses of the wills of donors, by letting a second husband or wife be dowable, or tenant by curtesy. He could not see the difference, that *Gould* took, between a gift to a man and his heirs, and to the heirs of that man; he thought they had gone too far already in matters of intent, which made the law so uncertain; and in this case there was nothing but general words for the words *such issue* to refer to. *Holt* held, that this is a fee-simple, and by no means can be construed a fee-tail: He owned the intention was to make it a tail, but he could by no rule of law do so, without manifest violation of law. He said, surrenders must be construed as deeds. *Lit. f. et.* 31. To make a fee-tail, there must be a description of the body from whence the heirs must come. *Co. Lit.* 27. There is a great deal of difference between a man's expressing his intent in a will, and in a conveyance; for in the last, the law has established certain legal words, and no other, tho' they are tantamount, will do; but in a will, he said, the statute 32 *H.* 8. gives him power to convey away his lands at his will and pleasure; and he relied upon the words *will and pleasure*: Had the subsequent words, *pro defectu talis exitus*, been consistent with the first words, they would have qualified the general words. If a man give an estate to a bastard and his heirs, and if he die without issue, the remainder over, this is void; for 'tis a limitation upon a fee, to defeat and defraud the lord of his escheat. *Jones* 342. *Abraham and Twigg*, he said, was a great authority in this case; and he said he could not distinguish between them. *Co. Lit. fo.* 20. He said, a grant to a man and his heirs lawfully begotten, would be a fee, but to a man and the heirs of him, would be a tail.

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To construe this an estate-tail would be repugnant to the premises, because it is to them and their assigns; so that it is designed an assignable estate, which is contrary to an estate-tail, for that is restrained by the statute. *Hob.* 170. *Dyer* 264. He said, as the intent of the * parties is to be considered, so the rules of * P. 59. law are to be observed.

Queen *versus* West.

(35.) **T**HE defendant had an order made upon him, by two justices, for keeping a bastard-child; he appealed to the general quarter sessions, who confirmed the order, and committed him for disobedience to their order. He was brought here by *bab' corp'*, and 'twas moved by Mr. King that he might be discharged; for that the justices ought not to have committed him, but to have proceeded upon his recognizance; and of that opinion the court seemed to be. 2 *Bulstrode* 341. There was a fault in the first order, which was, Dr. Fuller and another, two of her majesty's justices of the peace, BOTH adjudge, &c. *Cro. El.* 108. *Cro. Car.* 464. But the court thought this not sufficient to quash the order: But they quashed it, for that it appeared, the justices ordered him to pay an excessive sum. And note; tho' they quashed the order, they ordered him to appear the next sessions.

Order for keeping a bastard.
Post 136.
2 *Ld. Raym.* 1157, 1198.
6 *Mod.* 180.
1 *Salk.* 122.
Holt 107.
S. C.

Colonel Layton's Case.

(36.) **H**OLT ordered precedents to be searched, if a person in execution for a fine can be bailed, having brought a writ of error, and assigned error. (Note; Colonel Layton was brought up by *bab' corp'*.) See *Cro. Car.* 557. 1 *Sid.* 320. 286. 1 *Keb.* 88. After precedents searched, Holt said, he found the cases not put fair in case of execution; and said, bail in case of execution was always refused; and of this opinion were the whole court now, and remanded him. See 2 *Keb.* 173. a difference between bail to reverse an outlawry and to reverse a judgment; because in the first case he is liable; for that is in order to bring the cause to a trial; and the latter is to defeat the whole record.

One in execution for a fine, not bailable.
Ante 46. post 236.
1 *Salk.* 106.
S. C. and see 1 *Sid.* 286.
2 *Keb.* 43.

* Startup *versus* Doderidge.

* P. 60.

(37.) **T**HE following cases were cited by Mr. Pengelly, to shew where a *modus* is uncertain, or exposes the parson to be defrauded, tis a void *modus*; and he made a difference
N between

A *modus* uncertain, &c. is void.
2 *Ld. Raym.* 1158.

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2 Salk. 657.
Lil. Entr. 19.
S. C.

between a certainty arising upon a contract between the parties, and where 'tis of common right. 3 Cro. 139. 2 Roll. 264. 1 Keb. 612. Hob. 107. Styles 397. 2 Cro. 671. Broderick cont. as in cases of tenures, 11 Co. 15. 2 Leon. 107. 3 Mod. 132. 4 Inst. 96. Holt said, whatever may be good by agreement, may be good by custom; and as custom may diminish tithes, so it may increase them. So by custom, lead in Derbyshire pays tithe. Whenever a *modus* runs high, 'tis a strong presumption, 'tis no *modus*. Note; In this case the court refused a prohibition; for that it appeared the *modus* (as 'twas pretended to be) was of nigh the full value.

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4 Annæ Reginae in B. R.

Anonymous.

Scandal. 1158.
2 Ld. Raym.
1158.
2 Salk. 697.
S. C.

* P. 61.

(1.) **M**R. Serjeant Darnel moved in arrest of judgment, in an action for words; the words were, *you have forgot since you lived in the Black Bull Yard; you are a rascal and a villain; there you could procure broad money, and could clip it when you had done, and there the sheers could go.* He insisted upon it, that * there was nothing in these words alledged but only a power of doing, but no positive charge. Powell said, taking the words altogether, they would bear a strong intendment that the fact was done. Holt put this case: Suppose a man is dead, and A. says *John of Styles* could have murdered him; Q. If this would be actionable. The court took two or three days to consider of it: But afterwards the plaintiff had his judgment.

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Page *versus* Hayward.

(2.) **T**WO general questions were: 1. Concerning the estate the sisters take. 2. If the recovery suffered is sufficient to dock the tail. And resolved *per cur'*, 1. *Mary* takes an estate-tail in possession, and the other an estate-tail in remainder. See *Co. Lit.* 26. b. 17 *E.* 2. 23. *Holt* also said, the statute *de donis* is not to be taken strictly, but all limitations, within the meaning of the statute, ought to be supported: *Words of an express condition shall not ordinarily be construed as a limitation: But where an estate is to remain over for breach of a condition, which is by express words of a condition, yet it ought to be intended as a limitation.* Suppose a *præcipe* is brought against tenant in tail and a stranger, is this a flaw? Surely no: Such a recovery I hold good. 2^{dly}, I hold tenant in tail may well make a tenant to the *præcipe*. See 2 *Roll.* 194. tit. *common recovery.* *Styles* 319. 3 *Cro.* 21, 2 *Cro.* 318.

Of limitations and conditions.
2 *Salk.* 570.
3 *Salk.* 96.
135.
Holt 618.
and *Pig.* on *Rec.* 176.

Queen *versus* Johnson.

(3.) **M**R. Serjeant *Broderick* moved to quash an indictment, which set forth, that a justice had committed a woman to prison, there to be kept till further examination; and that because the officer did not carry her to prison, but kept her in his own house, though he brought her forth upon demand, he was indicted, as disobeying the justice's order, and behaving himself *negligently, &c. The commitment was on *Saturday*, * *P.* 62. and he brought her forth before the justices on *Monday*. *Per cur'*, He ought to have carried her to prison forthwith; whereupon the court refused to quash it. It appeared also, that during the time, he took a note from her for 10s. which the court held a great misdemeanor.

Officer indictable for not imprisoning one committed.
1 *Salk.* 381.

Bishop of Cloyne's Case. Error out of Ireland.

(4.) **D**R. *Lane*: If a chancellor of a diocese commit an irregularity in his office, the bishop cannot call him to an account in his own court; but ought to carry it before the archbishop. A vicar-general is created by a bishop, but his office is by the law; and he may exercise such a jurisdiction as belongs to his office; which is a general jurisdiction, and the bishop cannot hear causes himself, neither matrimonial or other, but it must be done by his proper officer; and if he refuses or neglects to make an officer, the law has taken care to provide that the archbishop, and then the queen shall. Every presentation ought

Error from Ireland.
Of vicars-general.
If the chancellor of a diocese is faulty, the archbishop has cognizance of it, not the bishop. 2.
Holt 599.
602. *S. C.*
1 *Salk.* 134.

Trinity Term 4 Ann.

ought to be under the seal of the Consistory Court; for he said, he knew no other seal, neither had the bishop any other court, but the Consistory Court. Bishops may delegate all external jurisdictions, but consecration of churches, or confirmation, &c. which are annexed to the person of the bishop. There is no difference between a vicar-general and a chancellor. *Linderwood, li. 2. tit. 4. p. 104.* describes what the vicar-general may do. *Sequestration.* A vicar-general cannot dispose of any livings in the gift of the bishop, because it is annexed to the bishop as his personal property. *Li. 3. decr. tit. 6.*

* P. 63.

Institution and induction is an act of the law; and tho' by his granting the vicar-general institution and induction, he was not concluded himself, yet his vicar hath a concurring jurisdiction. He compared the excepting institution and induction in the general grant to the * chancellor, to a lord of a manor's granting a patent to his steward, reserving that his steward should not take a surrender, nor make an admittance; this he said was a nullity: For when the bishop or lord has made him an officer, the law gives him his power. *Reservatis nobis* such a jurisdiction of itself does not exclude the chancellor; but only leaves a power to the bishop, which otherwise he would have lost, and so they have a concurring jurisdiction.

Dr. Floyd. A vicar-general is a temporal officer, and the bishop might have turned him out at pleasure; but by the confirmation of the dean and chapter, and by the temporal law, he has a freehold; but the intent of the law was not to give away all the authority from the bishop, but the chancellor was only to assist and help the bishop. He said, the law would not take notice of a certificate upon a *capias excom'* from the chancellor; for, in the eye of the law, the bishop is the ordinary. There is a difference between *judices ordinarii* and *judices delegati* in the civil law. Granting of licences to school-masters belongs to the bishop; and no chancellor ever pretended to this. He said, that by a general grant of a chancellorship, the power of institution, induction, &c. does not pass without special words, and so many other things which are inherent in a bishop. But if institution belongs to the office of a vicar-general, then such a revocation is void and repugnant; which the court seemed to agree in. The court ordered search how their antient patents run, and if there were antiently any revocations. *Holt* said, he thought the bishop might sit in court, for he is a judge; but he cannot deprive his chancellor of his temporal fees. If before the statute of *H. 8.* which enables laymen to be chancellors, institution *de jure* belonged to the chancellors; then reserving this now is void: But if it requires special words to pass it, then it may be reserved. But it being a matter of great moment, the court ordered it to be argued again next term.

(5.) Mr.

Trinity Term 4 Ann.

(5.) Mr. *Eyres* moved to quash an indictment against a woman, for using the trade of a milliner, not having * served an apprenticeship. But the court refused to quash it; and *Holt* said, it ought to be tried if it was within the statute or not: For it did not appear to the court, but that it might be a trade at the time of making the statute; and all trades are not enumerated in the statute, but yet they may be within the meaning.

Indictment
for using the
trade of a
milliner.
2 Salk. 611.
* P. 64.

(6.) The case was in an assault; it appeared the defendant came *manu forti* to rescue a distress from the plaintiff; and that the plaintiff had not time to request him to forbear, therefore the assault was well justified; *per cur'*.

An attempt
to rescue will
justify an
assault.
2 Roll. Abr.
549.

Mich. Term, 1705.

4 Annæ Reginae in B. R.

(1.) **A** RULE was made, that where a *mandamus* went above forty miles, the return should be at least fifteen days and where under forty miles, eight days at least.

Return of a
mandamus.
2 Salk. 434.
Str. 407.

(2.) When a jury bring in a verdict, and there is surplusage, the court will reject the surplusage. 3 *Leo.* 80. 7 *H.* 6. 20. 1 *Leo.* 323.

Surplusage in
a verdict re-
jected.
2 Saund. 255.
308.

Queen *versus* Whitten.

(3.) **U**PON a motion to quash an order of sessions upon a settlement, for that it was not in the order, that they adjudged him to be last settled in such a parish he came from; the court held it not necessary so to adjudge it; but it not appearing in the order, that * he had been chargeable to the parish, but only that, *whereas he was likely to become chargeable*, the court quashed it; for by the certificate the parish is bound to receive him, and cannot remove him, till he becomes actually chargeable.

Order of set-
tlement
quashed.
2 Salk. 473,
491, 530.
Holt 572,
577.
Str. 77.
* P. 65.

Mich. Term 4 Ann.

Swaine *versus* Stevens.

Ter-tenants
to sever in
pleading.
2 Salk. 601.

(4.) **I**N case of a *scire fac'* against several ter-tenants, they cannot join in a plea, but ought to plead severally. 2. If after a plea in abatement, a special non-tenure may be pleaded; for *Holt* said, by pleading in abatement, *he had admitted himself tenant*. See 8 *Ed.* 4. 19. *b.* 2 *Brown* 1. *Owen* 134. 16. 1 *Inst.* 121. *Cro. El.* 122, 739, 740. 2 *Roll.* 144. 1 *Lev.* 190. 7 *H.* 6. 25. *b.* 8 *H.* 6. 32. *b.* 2 *Keb.* 46.

Bridge *versus* The Parish of St. Marybone.

Order of baf-
tardy.
Post. 136.
(the Queen
v. Simmons);
and the au-
thorities there
cited.

(5.) **O**N certifying an order of justices, upon the stat. 4 *El.* 6. An exception to the order was, that the judgment ought to have been, that in as much as they had ordered him to pay the money, and he had refused to pay, then to commit him; but in this case it was, that they ordered him to pay so much, and in case he refused, then, &c. *Holt* said, the act directs in what manner the money shall be levied; that is, first an order or a judgment that he is in arrear; then if he does make an actual refusal, an award of distress; and if upon a return that he has nothing to be distrained by, then a commitment.

The court confirmed that part of the order relating to his payment of the money, and quashed the order for the commitment; *nisi causa*, in a week.

* P. 66.

* Knight *versus* Barker.

Trover of
pieces of
ends of
boards.
2 *Ld. Raym.*
1219. *S. C.*
Style 75.
1 *Keb.* 34.

(6.) **I**N arrest of judgment, for that the declaration was in trover for *quingentis peciis intestinarum, anglice* of ends of deal boards. Sir *James Mountague*. Pieces are of a very uncertain signification; for that they might be middle-pieces, or side-pieces; and they might be of very uncertain dimensions. *Palmer* 393. *Latch* 216. *Styles* 247. 3 *Keb.* 153. 1 *Keb.* 124, 176. *Serjeant Darnel cont.* Trover will lie for a study of books; and the law does not require so precise a form in this action, as it did in the infancy of it; and if it was according to the common acceptance, 'twould be very well. *Powell*. Workmen call all those short pieces, not being fit for wainscoting, flooring, &c. ends; and this being a particular term of art amongst the house and ship joiners, and generally understood by workmen, is a proper denomination for all short pieces: Had it been for *peciis extremis* or *exterioribus*, it had not been so well; for these words would

Mich. Term 4 Ann.

would not comprehend the middle-part. Adjudged good, *absente Holt*. But afterwards the court gave a farther day, when judgment was affirmed by *Holt, &c.*

The Queen *versus* Gunr.

(7.) **A**RREST of judgment in an indictment of perjury, before the justices of peace in *Norfolk*, for that it set forth, that a fine was levied in the court of Common Pleas, *Westminster*, in the county of *Middlesex*; and that the defendant perjured himself at *Tbeed* in the county aforesaid; which Mr. Serjeant *Weld* held, must relate to the last county named; and then the justices of peace for *Norfolk* could not have jurisdiction; and this he said was the express case of the *Queen v. Rhodes*, adjudged about two years ago in this court. Sir *James Mountague* cont. and said, if it had been in case of an action, it would * have * P. 67. been good: He took a difference between the counties being in the margin, and in the body of the indictment, and where it is only by way of recital, and in the substantial part of the indictment. Serjeant *Weld*. If it can ever be construed bad, it shall never be taken otherwise in an indictment. The opinion of the court was, that the indictment was naught; *sed adjur'*. Afterwards *Weld* took another exception; that justices of the peace have no power by their commission, to take indictments of perjury and barrettry; but the court doubted, and seemed afterwards of opinion they might.

(8.) *Powell* said, there could not be a nuisance to a market or franchise, but to a highway, &c. 2. No nuisance to a fair, &c.

But see F. N. B. 184. 2 Roll. Abr. 140.

Serjeant T. Whiteacre's Case.

(9.) **I**N the case of a *mandamus* to restore Serjeant *Whitaker* to the recordership of *Ipswich*. These cases were cited to shew that a corporation by prescription may have several names by reputation; as if they are called by one name, tho' it is not exactly the right name; yet, if 'tis sufficient to describe the persons, they must answer the writ. 6 Rep. 65, 66. 21 H. 6. 4. 10 Rep. 125. b. 9 Rep. 48. 38 H. 6. 33. Fitz. tit. 3. 457. 1 Cro. 416, 418. 2 Roll. Abr. 136. One reason for turning him out was, that he did not attend at their sessions, after they were appointed. *Ye'v.* 116. A difference between justices of the peace, and of *oyer and terminer* and gaol-delivery. St. 4 Ed. 3. 2 Leo. 117. 3 Cro. 90. Cont. C. J. Jones 51. 9 Co. 50. 2 Co. 155. *Non utere* is a forfeiture, Co. Lit. 223. *Dyer* 114. Serjeant *Weld* cited these cases about misnomers, 3 Cro. 338. *Moor* 233. 1 Roll. Rep. 118. 1 Keb. 623.

Mandamus to restore a recorder. 2. 2 Ld. Raym. 1233, 1283. 2 Salk. 434. Holt 443. 445. S. C.

* Hil.

* P. 68.

* Hil. Term, 1705.

4 Annæ Reginae in B. R.

Anonymous.

Copyholder
has only a
possessory
property in
timber-trees.
Post. 94.
2 Salk. 638.
1 New Abr.
485.

(1.) **H**OLT said, a copyholder has only a possessory property in timber-trees, which if severed from the freehold by tempest, or otherwise, the property would be in the lord. He said further, and so was the opinion of the court; that 'twould be a hard custom for the tenant to claim such trees; for such custom would be to give away the property of the lord; especially in this case, which was occasioned by the act of God. He also questioned if there could be such a custom, as for a copyholder to cut timber; he having only a possessory interest, by reason of its being annexed to the copyhold land.

Private customs here
cognizable,
89.
1 Salk. 269.

(2.) This court will, upon a writ of error, take judicial notice of all private customs in private places; for the courts below are as much bound to proceed upon their customs as the judges here are upon the common law.

Lewis *versus* Jones.

Trespass on
the case.
Variance
cured by
verdict.
6 Mod. 138.
Lil. Entr.
225. S. C.
* P. 69.

(3.) **T**RESPASS *super casum*; the jury finds him guilty of the trespass *prædict'*, which Sir James Mountague excepted against, because 'twas a variance; for that trespass *prædict'* was trespass in general. But Letchmere answered, this was helped by a verdict, *quod concessum fuit*. Another exception Sir James took, that by the record it * appeared that damages were assessed by the court, which would have been fatal, but that it appeared, by the entry of the judgment, that the judgment mentioned the damages and costs assessed *per juratores*; and then it went on *per cur' prædict' modo & forma prædict'*, which the court said was idle and mere surplusage.

Jackson

Hilary Term 4 Ann.

Jackson *versus* Humphrys. Error.

(4) **A**N action of escape. The exception was, that it was not shewn, that the party was in custody at the suit of the plaintiff, at the time of the escape; and *Holt* said, they ought to have shewn that he was arrested and taken at the suit of the plaintiff, and then escaped. The like where a man is in custody before any suit. A charge of him in custody is in law an arrest. *Dee* said, it was pleaded, that at the time of the escape a plaint was levied in the counter, whereby he was charged in custody at the suit of the plaintiff. *Holt* said, *charged* was a vulgar expression, but not a legal one. A person is not in custody of the sheriffs of *London* till he is brought into the counter, and be before in the custody of the serjeants. *Holt*. A man is not regularly in custody, at the suit of another, till a writ is delivered to the sheriff, and arrested; you cannot declare against a man in custody any where but in this court: But a process must go to the officer to bring him to the bar. A plaint is in the nature of an original, but not of a *capias*; and the declaring against a man *in custodia mar'* is the special custom of this court. But a plaint will not be sufficient to found an escape upon, till process goes out to bring him in custody, *viz.* to bring him into court; for by the plaint he is supposed to be at large. *Powell* differed. *Adjorn'*.

Error in a judgment on an escape.
1 Salk. 273.
Holt 280.
S. C.

(5.) A motion for a prohibition upon an *affidavit*, because the cause arose out of the jurisdiction, *viz.* in the isle of *Ely*. But *Powell* denied it; because the proper way * is to plead it, and if they refuse the plea, then a prohibition.

No prohibition till plea to the jurisdiction.
Post 132.
* P. 70.

Brown *versus* Dyer.

(6.) **I**F a copyholder dies, and his wife has her free-bench. *Q.* If this excrescent estate do not so take away the discent, as if the son dies before the estate actually comes to him, that then the next heir to the father shall claim; and if this will not make a *possessio fratris*?

Free-bench of copyhold.
Q. If discent is tolled.
Post 73, 98, 107.
Holt 165, 6.
2764, &c.

S. C. and see 5 Burr.

(7.) *Q.* If a lord receive rent, or take a fine before admittance, if this will not amount to an admittance?

Admittance implied.
Post 73.

(8.) A writ of error is a *superfedeas* to all proceedings on that judgment. Debt on a judgment will not lie here till the record be brought here in court. *Powell*. An action of debt will lie pending a writ of error. *Holt*. If an escape be against a sheriff,

Writ of error supercedes all proceedings.
Post 78.
Holt 196.

P

and

Hilary Term 4 Ann.

Barnes's 4to.
edit. 246.
Caf. Pr. C.B.
129, 159.

An appeal of
murder a-
gainst three,
all may join
in error.
Holt 277.
S.C.

and judgment thereon, and a writ of error is brought, and the first judgment is reversed, the party shall have an *audita querela*.
Adjorn.

(9.) Appeal of murder brought against three persons, and judgment, they may join in a writ of error; and yet in law they are several judgments, viz. *et quilibet eor' suspend' per collum*, or they may have several writs of error, according to the nature of the case. But if there are several judgments upon one recognizance, and no joint words, there 'twas doubted; if the writ of error ought to be several. Note; The proper way is to have judgment *secundum formam* of the recognizance. Q. If a judgment is several, and costs joint, what writ of error is proper?

* P. 71.

Tender.

In trespass,
tender must
be of suffici-
ent amends;
cont. of an e-
stray.

Post 89.

Amerciament
at a court-
baron.

1 Salk. 56.

S. C.

Post 76.

(10.) *Per cur*. In case of a trespass, the tort-feaser ought to tender *amends sufficient* at his peril; and there needs no previous demand. But in case of an estray, if the owner comes and says, *tell me what is due to you and I will pay you*; this, Holt said, *prima facie* is a good tender; for it lies only in the privity of the lord how much is due. And in this last case, the stray is no trespass, but the lord seises it in right of his franchise. Co. Ent. 170.

(11.) Holt said, he never understood that case in Hob. 129. In case of an amerciament at a court-baron, the certain sum need not be set by the court, but it is enough if it be ascertained by the assessor: And Mr. Pengelly said, many authorities are otherwise.

Easter Term, 1706.

5 Annæ Reginae in B. R.

Sir Charles Thorold *versus* Smith.

Servant sent
for money,
takes a note
on one who
sails, &c.
Post 87.
Holt 462.
S.C.

(1.) **T**HE defendant being indebted to Sir Charles in 100*l*. Sir Charles sends his servant to receive the money; the servant takes a goldsmith's note upon one Johnson, whereupon the servant gives a receipt to Smith; Johnson breaks within a week after: And if this was a good

Easter Term 5 Ann.

good payment to Sir *Charles*, or if the servant had pursued his authority in taking a note in lieu for money, and had a power to give a receipt to discharge the debt without receiving the money, was the question. *Holt*. * A bill is no payment; but if a man * P. 72. will give a receipt, he by that accepts the bill as money, and payment; and therefore upon the receipt this case turns. The principal objection from the bar was, that the servant had not authority to receive any thing but money, and consequently could not discharge the debt upon receiving the bill. *Powell* said, Sir *Charles* should have sent his man back again the same day to have dissented, else 'tis a presumption his master was acquainted with and acquiesced in what he had done, and this might have altered the case; to which the court agreed. Sir *Steven Evans's* case, the court said, differed from this case, for Sir *Steven* became a receiver to the use of *Ward*. If a man gives a note to another upon a goldsmith, and no receipt, 'tis usual to have three days as a convenient time to receive it; and if the goldsmith breaks in that time, 'twill be no payment. *Adjournatur*. V. post. Trin. 5 Ann. N. 6.

Bromfeild *versus* Kirber. Error.

(3.) **J**USTIFICATION of a trespass, *per* custom of a manor for common of vicinage. Sir *James Mountague* considered the extent of the word *vicinus*. 2 *Inst.* upon the statute of *Merton*. F. N. B. 127. b. 128. a. 22 H. 6. 89. *Dyer* 47. b. And argued, that no common can be of this kind, unless between two townships, manors, &c. next adjoining; and not where there is intermediate land; and that this tort was originally nothing but an excuse of trespass. *Holt*. Common of vicinage must be next adjoining. *Weld*. The place is the same, but by several names. *Holt*. The pleading makes it several, and not one intire place. *Weld* said, the verdict helped the pleading. *Holt*. The place may be in several manors. The cattle may stray into the next common by reason of vicinage; but they cannot go into a third, which, *Weld* said, would destroy all such common. *Holt*. *Vicinus* is to another purpose, and so expounded in 2 *Inst.* between landlord and tenant. *Powell*. This sort of * common must be in nature of an escape, and so an excuse: For a man cannot put in his cattle in the common of vicinage originally but they must escape. They may enclose one against the other, if they will be at the charge: It stands indifferent upon the pleading, whether the places were several or not, and so the verdict helps, for there are but two towns named. *Holt*. People ought to take care to keep their cattle under their own inspection, and not let them stray beyond their bounds. In pleading this kind of common, it ought to be pleaded mutual. If a man goes

Common
causa vici-
nagii.
Co. Lit. 122.
a.
Roll. Abr.
399.
* P. 73.

Easter Term 5 Ann.

goes in the common of vicinage to drive his cattle off into his own common; (for he ought not keep them in the common of vicinage;) he may justify this trespass; but if they go into a third common, such excuse perhaps will not hold. *Powell*. The verdict will help, for there is common of vicinage found, and but two places tho' several names, and they may lie in the same waste. *Adjournatur*.

Brown *versus* Dyer.

Surrender of
copyhold *and*
admittance of
the surren-
derec.
Ante 70.
Post 98, 107.
Holt 165,
166. S. C.
but see 5
Burr. 2764,
&c.

(4.) **I**N the case of a surrender to the use of *A*. The lands were found to be surrendered into the hands of the lord himself in full court; and that the lord assessed a fine upon the surrenderee, but never admitted him: Adjudged *per tot cur'*, that the heir of the surrenderee had no title; for that the title of the surrenderee is wholly by the copy of the court-roll, made from the entry upon the court-roll, which before admittance cannot be. But in case of a discent the heir may surrender before admittance, because he has a title by discent; but the lord in this case shall have a fine.

Keeble *versus* Hickeringill.

Case.
For hindring
wild ducks
from coming
to a decoy.
Post 130.
3 Salk. 9.
Holt. 14.
&c. S. C.
* P. 74.

(5.) **T**HE question was, if an action upon the case for shooting at, disturbing and scaring wild ducks * from a decoy-pond, without coming upon the plaintiff's soil, was such a damage as to support this action. Serjeant *Darnel*. Wild ducks are not such game as the law takes notice of; nor is a decoy a franchise, or comprehended within the word *royalty*, which the court said, signified a free warren; but *royalty* had no such signification, as is here claimed. Neither could a lord of a manor justify under a *royalty* to fish, hunt, or fowl in another man's soil. 1 *Jones* 440. 1 *Vent.* 122. A decoy is not a privileged place; if it were, he must have it by grant or prescription. *P. N. B.* 36, 37. a. 3 *Lew* 227. There is only a possessory property, so as to kill them when they are there.

Serj. *Broderick cont.* The declaration is, that the plaintiff was possessed of a piece of ground, whereupon a decoy, &c. and that the defendant, *malitiose* intending to deprive him of the benefit, came to the pond-head, and there disturbed, &c. Verdict *pro* plaintiff. The court will intend an entry upon his ground though 'tis not laid in the declaration; and saying he came to the pond-head must be taken to be his ground. A man, while things that are *feræ naturæ* are upon his ground or soil, has such a possessory property, that if one kills the game, tho' he does not enter, he shall have an action of trespass for entering his ground. *Keil.*

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203. And shall recover damages for the thing killed. 12 H. 8.
10. If a man puts up a hare in my ground, and follows it, and kills it in the ground of J. S. yet I may take it. A man has a market, and right of toll; if another disturb people coming to the market, 'tis uncertain whether any goods may be sold, and consequently no ill; yet for the possibility of sale I may have an action. A man ought so to use that which is his own, as not to hurt the property of another. Whenever there is malice and damage, a man may have an action on the case. 3 Keb. 753. and 1 Vent. 348. Holt said, he was not satisfied with this case. 'Tis agreed on all hands, while the ducks are in the pond, the plaintiff has a property, and the defendant was a wrong doer to disturb him; but to intend he entered, or that he came upon his ground, would be too material to *intend, it being trespass. But * P. 75[✓] suppose the defendant had shot in his own ground, if he had, had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong. He likened it to the case of a market and toll. It must be taken as 'tis found upon the record; but 'tis found to be done *malitiose*, and so it appeared upon the evidence. Powell. That every one has a property of things *feræ naturæ ratione soli*. A man may have a free warren in another man's soil, which he has *ratione privilegii*, and not *soli*, for one man may have a privilege in another man's freehold. A man may have such a property in hares, as if he put it up in his ground, and courses and kills it in another man's ground, still the original property is in him, and the courling is a continuance of this property. As this case is, the defendant has done an injury to the plaintiff's property, for by frightening them away you have destroyed his property.

Powis and Gould to the same intent. A man may lawfully shoot in his own ground, as to kill venison, &c. but not to destroy maliciously the property of another. Adjourn'd, and to stand in the paper till next term. *Vide post*.

Queen and Truebody.

(6.) **MANDAMUS** to restore a burges to his freedom; but it appeared by the return that he had abdicated the corporation for above four years last past; and that he had removed himself and family fifteen miles off, and that he had been summoned to attend, and did not; whereupon they discharged him; and held well. If a man attends his office, tho' he lives out of the corporation, yet his attendance upon the office will be a sufficient residence. Powell doubted, if a man lives out of the jurisdiction, whether they need summon him out of the jurisdiction? It seems not. But if he voluntarily attends, he answers his duty.

A burgesship
abdicated,
&c.
2 Ld. Raym.
1275.
Holt 449.
S. C.

Q

Brook

Easter Term 5 Ann.

* P. 76.

* Brook *versus* Hustler.

Amercia-
ments at leets.
Ante 71.
1 Salk. 56.
S. C.

(7.) **E**RROR out of the Common Pleas upon a judgment in debt, for an amerciamment in a court-leet; the defendant made default of suit after a general notice; and the amerciamment affeer'd. *Holt*. The jury may amerce in a certain sum if they will, and then there needs not an affeerment; tho' the proper way is, *ideo fit in misericordia*, and then an affeerment. *Pengelly* took an exception, that the court being uncertain when it will be held, (that is, where the lord may hold it when he pleases) a particular and convenient notice ought to be given, when and where the court is to be held. 32 *Ed.* 4. 27. *b.* 28. *a.* 3 *Cro.* 353, 555, 556. A general notice in the church is not notice to incur a forfeiture, unless a particular custom for it.

Serjeant Cheshire cont. 'Tis found that due notice was given, and this the judge of assize is supposed, upon the evidence, to direct the jury.

Holt. We cannot judge of the notice, because you ought to have shewed particularly, that he was summoned to the court at such day and place to be held. *Powell*. To take advantage of a forfeiture, notice should be personal, unless a particular custom to the contrary. In antient leets, personal notice perhaps is not necessary; but notice in church and market may be well. But otherwise where 'tis not an antient leet. 1 *Brown* 166. *Winch* 987. *Co. Ent.* tit. *Error*, 280, 284. *Adjournatur*.

Gouch *versus* Buxton.

Scandal of a
parson, pro-
hibition, &c.
3 Salk. 269.
S. C. but not
S. P.

1 *Ld. Raym.*

423.

2 *Salk.* 692.

* P. 77.

(8.) **O**N a Motion for a prohibition; the plaintiff in the spiritual court was a parson, and the defendant said to him these words, *thou art a sauce-box, firrab! a rascal and scoundrel fellow, and wilt make an affidavit to any thing.*

* *Serjeant Weld*. A prohibition ought not to go; for to say a man will swear any thing, is a great scandal, much more to say so of a clergyman; and cited 2 *Roll Abr.* 297, 295. 1 *Keb.* 521. 2 *Lutw.* 153. 3 *Lev.* 17. 2 *Keb.* 439. *March's Rep.* 153.

Page cont. These words words import matter of heat, and not of scandal; and only shewed the opinion his client had of him at that time. *Holt Ch. J.* Suppose these words in this libel had been spoke of a layman, could he have had an action? no; then how the more for his being a clergyman? for the words do not touch him immediately in his office. To say a parson is a rascal is no more than to call him a rascal. *Powell*. There is a difference between defaming a parson and a layman, but then it ought to be something for which he may be drawn in question in the
Ecclesiastical

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Ecclesiastical Court. He said, he remembered a case in the Common Pleas, for calling a parson *pimp*; and they would not grant a prohibition; for that the word *pimp* had a common and known signification; and the like in calling a layman so. In the first words here, there is nothing scandalous, and then it adds, *you will make an affidavit to any thing*, this does not charge him with any act which can draw him into question thereof. *Powis.* Here is no *colloquium* of his function, and the words import only heat. Suppose he had said, you will murder a man, this is only the opinion he had of him, &c. *Gould.* He remembered the word *pimp* was adjudged to be one who *procured women*. But he thought in this case, take the whole together, they imported a great scandal. And afterwards *Powell* desired time to consider of it. For all the books make a difference between defaming a parson and a layman. Which *Holt* said he saw no reason for; for the characters and consciences of other men are as tender, and of as great concern to them, as a parson's. But *Powell* said, to call a parson *knave*, a prohibition has been denied; but no doubt but 'twill be granted in a layman's case *Adjournatur*. Note.

* (9.) *Holt* said, let this be a general rule of court, that no special imparlances be, unless by motion to the court, and shew reasons for them. * P. 78.
Reg. East.
5 Ann. B. R.

(10.) The court doubted if debt would lie upon a judgment, pending a writ of error. See 1 *Lev.* 153. 1 *Sid.* 2 *Vent.* 261. *Holt* said, *Vaughan* was of a different opinion from *Hale* in this matter. *Et adjournatur*. But the law seems now fixed, that a writ of error stays all proceedings whatsoever. Writ of error, a super-seedeas.
Ante 70.
Holt 196.
Barnes 4to ed. 246.
Caf. pr. C. B. 129, 159.

(11.) *Holt.* Bond to save harmless against several particular things, and after in general; here, to a general declaration, *non dampnificatus* is a good plea, and then the plaintiff should shew a breach; though perhaps 'tis better to answer to the particular things, and then to say *quoad* the rest *non dampnificatus*. *Cro. El.* 253. The plaintiff should have assigned a particular breach before he had demurred. A general non dampnificatus to particular assignments.
5 Mod. 244.

Queen *versus* Drake.

(12.) INFORMATION that he wrote a scandalous libel, intitled, *Mercurius Politicus*, in which is contained several libellous matters (*inter alia*,) and set it forth *secundum tenorem sequentem*. A special verdict, they find all but *not* instead of *nor*; 'twas *nor* in the record, and *not* in the paper. The principal scandal Mr. Solicitor said was, that the late revolution was the destruction of the laws of *England*. The information being set forth *in hæc verba*, and there being a variance, he said was the objection Libelling against the ministry.
Post 84, 95.
2 Salk. 660.
3 Salk. 224.
Holt 347.
Cro. 425. S.C.

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objection from the other side. But if the substance was found, 'twas sufficient to make it a libel, especially it being an immaterial variance. For *not* he said carried in it the same sense as *nor*. Therefore, admitting it a variance, 'tis an immaterial variance. *Dyer* 75. Sir *John Bridges's* case, *Cro. Jac.* 407. *Hob.* 180. 1 *Roll Rep.* 421. (*ro. El* 503. A man may declare for words in *latin* which were spoke in *english*, which shews that the substance only is regarded by the law. *Mr. Lutwich cont.* The question is, if the information is * for the same libel, 'tis said to be *secundum tenorem sequentem*; now the word *tenor* is the thing itself, and ought to be a true copy of it. *Reg.* 169. *a.* This differs from the law of words, because in this case the matter is reduced to writing. In an action upon the case for a malicious indictment, in the declaration there should be no variance, because they may have a sight of the record. So here, for they had the book to guide them. Adjourned till next term.

* P. 79.

Vexatious complaints.
Comb. 29.

(13) When a person complains to this court of a misdemeanor, and 'tis adjudged his complaint is vexatious; this court will not allow the privilege of protecting him returning.

Queen *versus* Atkinson and others.

Fraud in collecting and converting money.
2 *Ld. Raym.* 1248.
1 *Salk.* 382.
S. C.
2 *Roll. Abr.* 81. (N.)
pl. 6.

(14.) **I**NDICTMENT. The defendants being collectors of several duties and sums of money, collected of *A. B.* not being assessed, and converted the same to their own use; the defendants demurred. Serjeant *Cheshire* excepted against their being joined in the indictment; for that they ought to be severally indicted. 1 *Vent.* 302. 2 *Roll Abr.* 81. *Holt.* If it appears to be several offences, there ought to be several indictments. *Powell.* If two men commit a felony together, they may be jointly indicted. *Holt.* So if men join in a battery, they may both be joined, tho' two several fines shall be set upon them; the like in an indictment of felony, but they shall severally have judgment. It appeared both these collectors received the money jointly. Judgment against the defendants. *Gould* said, had they not been guilty, they would never have demurred, but have taken issue.

Queen *versus* Belwood.

* P. 80.
Permitting a prisoner to go at large.
1 *Hale's hist.* P. C. 588, &c. 600.
2 *Hawk. P. C.* 122, 134, 135.
Ante 61.

(15.) **I**NDICTMENT. The case was; a justice of peace had power to commit to ward, which is the word in the statute: The justice committed one to the * gaoler of the county. And *per cur'*, The Sheriff, and consequently his gaoler, is the proper officer; and if he let him go at large, 'tis such an offence as is proper for an indictment.

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Queen *versus* The Clerk of the Peace of Cumberland.

(16) *CERTIORARI*, directed to the justices of Cumberland.

Articles in writing were exhibited to the court there against the clerk of the peace, charging him with several misdemeanors in the execution of his office; *viz.* (*inter al'*.) That he did exact of several people, and force them to pay more money than his just due and fee; and upon due consideration, and upon being heard by his counsel, he was convicted and discharged of his office.

Extortion of officers, &c. clerk of the peace.
1 Salk. 382.
Post 137.

Gould. This is a good conviction; the first question is, if this return is good in form? The crime is extortion, and so 'tis expressed fully in one article; where there is a charge of extortion, it must be particularized. In the premisses there is certainty enough; but if the *viz.* is sufficient, is the question; he held it to be certain enough. Another question arose upon this office being a freehold; but then this act of parliament creates this freehold, and also the jurisdiction of the justice of peace as to it. The words of the statute are, *If he shall misdemean himself, and upon examination thereof before them at their sessions, upon articles in writing, and upon a conviction, they may discharge him.* The *viz.* in this case connects the charge and the premisses, and carries on the same matter; sometimes a *viz.* is absolutely void, as when 'tis repugnant to what goes before, but if it explains the matter precedent, 'tis good to serve the preceding purpose. 1 *Saund.* 169. 1 *Vent.* 107. 'Tis sufficient; for justices of the peace, who are not so skilful as lawyers, if they pursue the substance of the statute; and is not like the case of indictments, but rather like orders.

* *Powis* of the same opinion. By 1 *Will.* This is a good order; when an act of parliament erects a freehold, and erects a judicature at the same time, 'tis subject to be defeated and destroyed according to the direction of the act; and is like the case of a fellow of a college, who may be removed by his visitor. 1 *Vent.* 37. The *viz.* incorporates the subsequent charge with the precedent general accusation; where the words *in the execution of his office* are omitted, then the *viz.* ought to say, that he committed the offence in the execution of his office. The word *that* would be nonsense, were it not for the *viz.* for the charge is, that he committed divers offences in the execution of his office, *viz.* *That he, &c.* Even in indictments, he said, he had found two precedents strong to this purpose, *West. Pref. Sect. 97. of Videlicets*, and the same book, *Se. 130.* 1 *Sid.* 91. 'Twas objected, that in the charge 'tis not said how much too much he had taken *colore officii*; but then he said, the justices had adjudged,

R

that

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that he had taken 9 s. too much, more than was his fee, *colore officii*. That being a court of judicature, they in open court debated the matter fully, and gave judgment; and this court ought to judge favourably, that they have proceeded regularly.

Powell Justice contra. This removal and return is not sufficiently certain; this is a freehold, which the law requires great solemnity in removing, and much different from chattels. My brother makes a difference, that this is a new freehold, but he could see no difference betwixt a new and an old freehold. 'Tis true, this act of parliament hath created a new way of trial; but he could not agree with *Powis*, that a trial in this way was the properest, for a trial by a jury is the greatest check and security against arbitrary, &c. But if this removal pursues the authority in the act is the question. In every charge there ought to be something particularly charged. If a man is indicted of divers misdemeanors in his office, *viz.* &c. *Q.* if certain? If a man is indicted for feloniously stealing divers goods, *viz.* that he took a coat, &c. why this would not be good, without the *felonice cepit & asportavit* to every one. * P. 82. This ought to be construed as in indictments, especially since his freehold is concerned, and therefore it ought to be exactly certain. He said in the charge it did not appear that what he took was more than his fee; and the adjudication will not help this defect, for they ought to judge upon the charge. *Hutton* 9. 3 *Leo.* 168. He would in this case take all things strictly, and the act of parliament says misdemeanors, but here is only one single act and charge.

Holt Ch. J. This order ought to be quashed. He considered two things: *First*, This charge ought to be certain, that in case of an appeal it may appear whether the matter they proceeded upon was sufficient in it self, and certain. This case did not differ from an information. Must a man lose his freehold, because justices of the peace are not skillful, or honest, as *Powis* said. The justices are not to draw the articles, but to judge of them; 'tis a common right due to every man not to lose his right, without sufficient certainty; it ought to appear to the court to be a misdemeanor in the actual execution of his office, for it says the clerk did compel him to pay so much, but it does not say to him, nor that it was *colore officii*, *extorsive*, &c. Extortion is a specifick offence, and is as necessary to be set forth as *felonice* in an indictment. Again he said, he took 10 s. more than his fee; why, this may be, for perhaps he had another demand upon him. *Secondly*, 'tis the collection of the justices, by way of inference, that from the whole he is guilty; but that the justices cannot do, for here is no charge; but they have concluded from the premisses, and not from the charge, for the charge does not affect him; for when it comes to the *viz.* there was no charge before. Afterwards, upon looking into the statute, it appeared to be misdemeanor in the singular number. But the court remained still divided *ut supra*.

* Trin. Term, 1706.

* P. 83.

5 Annæ Reginae in B. R.

Willmot against The Chancellor of Worcester.

(1.) **P**ROHIBITION. The case was; *Willmot* commits incest in *Worcester* diocese, and about two years after removed his habitation into the diocese of *York*; and coming to the election of parliament men, this citation was served upon him in the diocese of *Worcester*; he appears by proxy, and pleads, that he lived in the diocese of *York*, and subject to the jurisdiction of *York*, & *nullo modo*, &c. The plaintiff was excommunicated. *Dr. Floyd*. 'Tis the practice of their court to call the person personally to appear; for the citation was *pro salute animæ*, and that cannot be done by proxy or counsel: No criminal can appear by proxy, neither ought he to have pleaded so contumacious a plea, but he ought to have made his appearance, with a saving to himself all benefit of exception; for *prima facie* there is a good jurisdiction to call him to answer, and then he ought to make protestation *de non consentiendo nisi de jure*, &c. The Roman senators had a privilege of being sued only in their superior courts; but if a senator had committed a base crime, he thereby had so debased himself, as that he should be subject to the jurisdiction he had offended. The statute of citations extends not to criminal suits, but only betwixt party and party. *Dr. Lane*. The former practice to appear personally in criminal prosecutions, was founded upon the power the court had to make him answer upon his oath, * which is now taken away by the statute. A man, that removes his habitation, must not be said to run away from their jurisdiction. The pope, by his usurped authority, delegated to the archbishop of *Canterbury* a power to cite a man out of his diocese, which by the statute is now gone. *Holt* said, this citation was originally wrong, 'twas against the statute; and granted a prohibition, that so they might plead to it, or demur; and so the point might be settled solemnly, being a case of great consequence.

An inhabitant of *Yorkshire* excommunicated in *Worcester* diocese. *Holt* 603. S. C. *Mcor* 467. *Show. Rep.* 17. *Godb.* 191. S. P.

* P. 84.

(2.) The

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Special ver-
dict amended
in a criminal
prosecution.
But see 1
Salk. 47. 53.
5 Burr. 2662.

(2.) The court were of opinion the entry of a special verdict, tho' in a criminal prosecution, may be amended, if 'twas not entered according to the notes taken; and the roll may be amended. *Gould* cited *Raymond* 465. and said, the court frequently amended informations. 2. If the court would amend in a case where they had not the minutes there. *Per cur'*, If the notes and the verdict vary, the court will amend according to the notes, else not. *Per cur'*, If a jury find for the Queen, and the verdict is entered for the defendant, yet at common law 'tis amendable; and it was agreed in *Dr. Drake's* case. If in a special verdict, the clerk takes the minutes right, and the verdict is entered up wrong, the court will amend the roll according to the minutes, tho' in a criminal prosecution. *Vide infra*.

Paupers dis-
paupered.
Caf. pr. C.B.
47.

(3.) 'Tis a singular favour to admit a defendant a pauper; but if such defendant will plead a dilatory plea, the court will dispauper him.

Queen *versus* Drake.

Variance.
Vide ante 78.
Post 95.
2 Salk. 660.
3 Salk. 224.
Holt 347, &c.
425
* P. 85.

(4.) **A**TTORNEY General took this difference, that this was only a literal variation, and made nothing in the sense; and if this was to be allowed, no criminal would be punished: For suppose in the libel the word *though* was in the information wrote *tho'*, this would be the same objection. As to the objection of *secundum tenor* **sequent*, this is not meant to be a literal setting forth, but a substantial one; as according to the tenor of the deed is according to the substance of it: Even the setting forth in *hæc verba* must be only in setting forth the substance. 5 Co. *Long's* case, which he made use of to this purpose; that if such certainty was required, the effect would be only to confound all certainty, according to the rule there mentioned, *nimia certitudo certitudinem confundit*. Suppose a *certiorari* to remove a record, would any man say, if such a variance was, the record was not well removed. *Dyer* 10. 75. *Allen* 10. 30. Where in actions for words 'tis laid in *hæc verba*, *Dyer* 119. *Roll Rep.* 422. 2 *Roll Abr.* 717, 724. 7 *H.* 6. 27. *Yelv.* 40. *Cro. Jac.* 32. *Styles* 344. 3 *Cro.* 2. These cases he offered to shew, that the law required substance and not form. If it had been a material variance, yet as this is laid 'twill be yet well; for the information is, that in that paper is contained divers scandalous and seditious matter; this matter in which the variance is is not the matter complained of, for that was not a scandal; and the information is not for any thing in which there is no hurt. *Erantwait cont.* If words have a doubtful signification, the court will construe them in the best sense. The word *nor* is a different word from *not*, the latter being a direct negative, the former is only a word of relation to something else.

Holt.

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Holt Ch. Just. An information for a libel may set forth the libel in *latin*; neither ought the whole to be set forth, but only that which is libellous in itself: And then at the trial, if it appears upon evidence, that the words abstracted from the whole book are not libellous, the defendant must be acquitted; the words *nor* and *not* have a grammatical variation. He seemed to rely much upon the case of *King and Bear*, 12 W. 3. Adjourned till next term.

* *Queen versus Dr. Brown.*

* P. 86.

(5.) **I**NFORMATION was brought to have judgment for a libel, called, *The Country Parson's Advice to my Lord Keeper*. The judgment was regularly signed, but the defendant did not move in arrest of judgment within the four days; and the court doubted whether they could hear counsel, this being in a criminal cause, the court ordered counsel to speak to this point. But afterwards the Attorney-general consented they should take their exceptions.

Libel against the ministry.
Hob. 215.
Poph. 139.

Brantwait excepted, that this did not import a scandal, but in their natural signification carry a credit, as to be wise as *Somerset*, &c. Suppose an indictment for a nuisance, which in itself is so, 'tis enough to say so generally; but if 'tis only a nuisance, as 'tis accompanied with circumstances, there it ought to be particularly set out; as for building an inn; or to build an inn *ad commune nocumentum* is not good, &c. 2 *Roll. Rep.* 345. so here the manner of speaking ought to be set out. *Holt*. An information will lie for speaking ironically. And Mr. Attorney said, 'twas laid to be wrote *ironice*, and he ought to have shewed at the trial that he did not intend to scandalize them; and the jury are judges *quo animo* this was done, and they have found the ill intent.

Judgment of the pillory, and fine of forty marks.

Lord Kingfale *versus* Compton.

(6.) **R**ECORD of *Trinity* term, an award upon the roll to try the issue returnable such a day; error, that the *venire* bore *teste* before issue joined. Where the award upon the roll is wrong, the statute of *jeofails* will not extend to it. *Powell*. The statutes of *jeofails* will not help the erroneous award of the court. This was a writ of error, and the error assigned was, that the record was of *Trinity* term, the *venire* was awarded *returnable *crastino Trin'*, which was before the term; now this being a wrong award of the court, it must be intended returnable the

Venire tested by award, before issue joined, The pleadings are in *Lil. Entr.* 478.

* P. 87.

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year after, which is an erroneous award of the court, and then there is nothing to award the writ by, the roll being wrong. The court seemed to be of opinion, that this was error, and not helped by the statutes of *jeofails*. *Sed adjournatur*.

Sir Charles Thorold *versus* Smith.

Receipt by
servant,
where good
sans special
authority.
Ante 71,
Holt 462.
S. C.

(7.) **S**ERJEANT *Darnel*. A receipt shall not be a good discharge, where a servant had not a special authority to give a receipt. 10 H. 7. 9. 4 H. 6. 1. 40 *Lib. Aff.* 38. Suppose a servant gives a receipt, and does not receive the money, shall this bind the master? So if he takes any collateral security, as a bond.

Mr. Eyres. The question is, if a servant is sent by his master for money, if he receives any thing else in lieu of money, whether this is a pursuance of his authority. It did not appear in this case, that Sir Charles had any notice of the receipt of the bills, nor of *Johnson's* breaking; but the servant sent the note back upon hearing of *Johnson's* breaking. A servant sent by his master to receive money, cannot release or discharge his master's debt, without receiving the money; for a receiver has no power to make any commutation, without a special authority. *Dr. & Stud.* 138. b.

Sir *James Mountague cont.* The authorities cited from the old books will not weigh much in this case; for the way of trade and commerce is of a quite different nature now. *Holt*. A bill of exchange or goldsmith's note is not payment, unless the party omits receiving it in a reasonable time, as three days, when he might have received it; but if he gives a receipt and accepts the note as payment, this shall bind him. In this case Sir Charles himself gave no receipt, but the servant. Where a man has authority to receive money, he cannot receive any thing else. * P. 88. 'Tis common practice, if a man receives a * goldsmith's note, and gives a receipt, 'tis purchasing the bill. In this case, it must be understood according to the course of the world and trade; that this servant had a general authority to do what his master would have done; this case differs much from the case of a servant or attorney to one particular purpose, but this is in nature of a factor, &c.

Powell, Just. No modern practice will alter the old law; the party himself may give a receipt, but a general receiver cannot receive any thing else. His own acquittance would stop him, but his servant's receipt will not. In this case the servant was sent to receive money: This servant, he supposed, had many times received bills for his master, and this is an authority to this purpose; but this indeed was proper matter of evidence, being

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being the constant practice of the world; and had this not been, Sir Charles would have asked his servant, what he had done; and when he had told him he had received such a note, 'tis a strong presumption his master approved of it, or else, 'tis to be presumed, he would have sent it back again. *Adjournatur.* Holt thought this was more matter of evidence than law; and any jury at *Guildhall* would find payment by a bill to be a good payment, it being the common practice of the city. And he proposed a new trial; Whether the servant had power to receive a bill, and give a receipt; which was agreed to. *Holt.* In this case, the receipt of a servant that has power, is the receipt of the master.

Andrews *versus* Strowd.

(8.) THE case was this: A settlement to husband and wife for life, and if he dies without issue male living, or *in ventre sa mere* at the time of his death; a remainder to trustees for 500 years to raise daughters portions; the husband dies, leaving issue male at the time of his death; which issue male soon after died without issue male; the wife dies; the question was, if this term should rise up again for the benefit of the * daughters? The opinion and judgment of the court was, that it should not, it being a condition precedent, and not a remainder upon the determination of the estate-tail. This judgment was reversed in the House of Lords, upon the reasoning that Mr. Raymond urged, *viz.* That the time of his death related only to the *ventre sa mere*; and then 'twas no more than an usual limitation; for the wife was not *ensient*.

Settlement to husband and wife for life, remainder to trustees for years.

This case is more fully reported in Holt 623.

* P. 89.

(9.) Raymond objected, that this court could not reverse a judgment given in another court, unless they could give the same judgment the other court should have given; which in this case cannot be, because the plaintiff in the original action was dead, and the court cannot give judgment for a dead man. He as executor might have an action for *bonis asportatis in vita testatoris*, but that is by the stat. E. 3. *Holt.* If this court cannot give the same judgment as the court below should have given, 'tis because the suit by the death of the plaintiff there is abated: But this court will reverse the judgment, which otherwise would be a perpetual bar; and by the reversal the executor is restored to his action.

(10.) *Per cur'*: If a man's estate is of such a nature, as that the commissioners cannot assess a certain tax upon every man, as in the case of common, &c. they ought not to meddle with it.

Commissioners of taxes. Post 206 254.

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Costs on discontinuance,
&c.
Sayer's Law
of Costs, 196,
&c.

(11.) Where the plaintiff in error is nonsuit, or where judgment is affirmed, or a discontinuance, there costs shall be allowed, but no costs where he is barred. 2.

Henley *versus* Welch.

Tender of
amends for
keeping an
estrav, &c.
2 Salk. 686.
Holt 563.
3 D'Anv.
Abr. 282.
(D.) pl. 2.
284. pl. 2, 3.
S. C.

* P. 90.

(12.) **H**OLT cited these cases to shew, that, in case of an estray, the lord ought to make a demand of what the amends ought to be for the keeping; and then, if the party thinks the demand unreasonable, he * ought to tender sufficient amends; but if he tender insufficient amends, the lord ought to take issue, and let the jury settle what the keeping is worth. *Noy* 144. *Godb.* 150. *Note*; In this case the action was brought for an estray colt; and by the replication it appeared, that 'twas after the year, and then it ceased to be an estray, and became the lord's property. *Holt*. It became an estray after the first proclamation, and not sooner; the owner is subject to pay for no more than a year's keeping, which shall commence from the seizure. *Powell*. The pleading a tender of sufficient amends is well, and a good issue.

Devise of all
his lands and
hereditaments makes
a fee.
Post 1027
2 Salk. 685.
Holt 235.

* P. 91.

(13.) Serjeant *Weld*. The question arose upon a devise to one of all his lands and hereditaments. 'Tis true, the intent of the party shall be supported, if possible; as *John a Stiles* shall be my heir, this carries a plain intent that the devise shall stand *in loco* of the heir; so a devise to one for ever; and this is agreeable to the law, for a release of all his estate will extinguish the right. The word *hereditament* is a common word, and 'tis here accompanied with other words; 'tis a word frequently inserted in conveyances, even in a lease for years; nay, 'tis so commonly put into leases, that people scarce think it safe without it. Now the intent of the deviser does no where appear to carry the interest, nor will this word bear such a construction. 'Tis true, the word *hereditas* does imply the interest, but the word *hereditament* is the thing itself, *viz.* the land. *Spelman Gloss.* 203. The word *hereditament* signifies not only what a man has by descent, but also what he has by purchase: If a man has only an estate for life, if he gives all his hereditaments for years, why this will pass. *Moor* 373. *Hob.* 2. 2 *Saund.* 1 *Vent.* 299. Tenant for life of lands levies a fine with warranty, the warranty descends upon him in reversion. No body will say, but if tenant for life levy a fine, he in reversion might have entered for the forfeiture. Where a warranty extinguishes a right, a release of that warranty will set it up again. The pleading a rebutter * shews it does not give a right: For the conclusion is not judgment *si actio*, but is by estoppel. *Fitz. tit. Droit.* 29. If a man covenants to make further conveyance, a man is not bound

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bound to convey with warranty, because 'tis no conveyance, but only a bar. 1 Roll. Rep. 71. Raym. 190. No doubt a warranty, so long as it accompanies the land, is a good defence.

Mr. Gilbert. As to the objection, The word *hereditament* being mingled with other words, *lands and tenements*, the court will not intend, when people are conveying their rights, that words are used for tautology. 1 Roll. Abr. 834. The statute of limitations cannot be given in evidence, where the *mise* is joined upon the meer right.

Holt. The word *bereditament* signifies the land in which I have an estate of inheritance. If a man leased all his hereditaments in *D.* this will carry all whereof he has an inheritance, and all freeholds, &c. Powell. Hereditament describes the thing of which an estate of inheritance may be; and carries that which lands or tenements will not do, &c. as common, &c. And the pleading is *quod clamat ut jus & bereditament suum*. See the case in Vent. 299. He said, he did not go upon the word *bereditament*, but the word *interest*. In this case, he said, the perpetual charge went a great way to carry a fee, and the personal estate will not be liable, but the charge shall rise out of the land which is permanent.

(14.) Holt. See *Bulstrode* 165. Father tenant for life, remainder to his wife, remainder to his first son in tail; the son is at age, the father makes a feoffment in fee with warranty, and takes back an estate to him and his wife; the husband dies, the wife is remitted, but the collateral warranty binds the son, for he is not remitted.

Feoffment with warranty. Post. 103. As to collateral warranty, see 2 Black. Com. 301.

(15.) Holt. If a legacy is given, or a sum of money in gross devised out of lands, he doubted not but an action of debt might be brought for that money; tho' such action never, as yet, had been brought; and that he *doubted not but that it might be brought upon the statute of H. 8. For whenever a statute gives a right, it must by necessary consequence give a remedy: And the proper remedy in such case is *debt*, which may be founded on that statute.

Debt for money devised as a legacy. 2 Ld. Raym. 937.

(16.) Powell. If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust, I shall have election to bring debt or account; and cited four or five cases. Holt. cont. If the party did not take it as a debt, but *ad computandum*, or *ad merchandizandum*, it must be an account, and he shall have the benefit of an accountant; which is, he may plead being robbed, which shall be a good plea in the last case, and not in the first. Adjourned. See 2 Lev. 5.

Debt or account for money delivered to buy goods. 2 Salk. 9. S. C. Cro. El. 644. Owen 86.

(17.) *Per curiam*. Altho' a cause has proceeded no farther than in paper, yet if the time is out for entering it upon the record; this court will not give leave, upon motion, to amend the declaration, upon paying costs. Let them declare *de novo*.

Declaration not amendable on payment of costs. But see 1 Salk. 47.

T

(18.) Note;

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Foreign u-
sances to be
shewn in the
declaration.
1 Saik. 131.
Cun. Law of
Bills, 12, 79,
87.

(18.) *Note*; About this time an *assumpsit* was brought by one *Bulkley v. Camden*, on a foreign bill of exchange, to pay according to the custom of merchants so much money, at *two usances*, viz. at *Amsterdam*; but it did not appear what the time of those *usances* was. *Holt* Ch. Just. said, he would take notice of the custom of merchants *here*, but not of that at *Amsterdam* or *Venice*, &c. In such case, you *must set forth the custom in your declaration*.

* P. 93.

* Mich. Term, 1706.

5 Annæ Reginae in B. R.

Hacket *versus* Tilley.

Bond to save
harmless a-
gainst escapes
2 Ld. Raym.
1207.
Holt 201,
204.
Lil. Entr.
160. S. C.

(1.) **D**EBT upon a bond conditioned to save harmless against any actions brought for any escapes.

A difference was taken between a general condition and a condition only to save harmless against escapes suffered by the party himself. And then a construction of words shall be according to the intent of the parties. 1 *Lev.* 63. *Yelv.* 197. *Hob.* 14. *Dyer* 306. *Owen* 100. *Dyer* 17. A condition shall be intended for the benefit of the obligor, and is in nature of a defeasance; *aliter* if the bond had been single. For construction of conditions, see *Hob.* 304. *Hut.* 40. 18 *Ed.* 4. 28. 1 *Roll. Abr.* 417. A bond conditioned to commit maintenance is void. 2 *Leo.* 107. *Moer* 186. 10 *Co.* 101.

Holt. A bond to save a man harmless from an unlawful act already done, is not void, but is an undertaking to bring him off: There is a difference between saving a man harmless from an action, and a judgment. For in saving him harmless from an action, he must take care it does not go to judgment; for then 'tis no longer an action. *Sed Q.* If not the necessary consequence of an action? And so within the condition. *Powell.* If a gaoler takes a bond from a servant, to save him harmless from all escapes to be suffered by the servant, 'tis good. A condition may be good for part, and void for part; but a * condition against a statute,

* P. 94.

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statute, if 'tis void in part, 'tis void in the whole. See the stat.
23 H. 6. c. 10. 10 Co. 101. 11 Co. 53.

Lord Banbury's Case.

(2.) **M**OTION to set aside a judgment irregularly entered up, and to set aside the execution thereon. *Charles Earl of Banbury* gave a warrant of attorney to enter up judgment by that name, but the plaintiff entered it up by the name of *Charles Knowles, Esq.* It appeared, that the bond was by the name of *Charles Earl of Banbury, &c.* The court set it aside; but said, if a nobleman will admit himself to have a wrong name, so that it cannot appear to the court that he is a peer, he shall not after say he is a peer, and so alter the nature of the execution.

Mistomer avoids both judgment and execution.
2 Ld. Raym. 1247.
2 Salk. 512.
S. C.

(3.) Mr. *Salkeld* cited the cases following, as to copyholders forfeiting their estates by exceeding their authority; as for a tenant for life trespassing upon the inheritance, by cutting timber. *Noy* 29. 1 *Vent.* 123, 163. 1 *Bulst.* 1 *Jones Hutton* 102. *Hetly* 5. He compared the case of a copyholder to the case of a tenant at will; viz. That which could be a determination of the will at common law, is a forfeiture of his copyhold.

Forfeiture of copyholds.
Ante 68.
2 Salk. 638.
1 New Abr. 485.

Mr. *Eyres*. Tenant for life lays a custom for all windfalls of timber; a void custom, being a greater than belongs to his estate. This is a custom to take away that right from the lord which the law gives him, without any particular reason to enlarge his privilege further than the nature of his estate allowed. *Moor* 8. *Fitz. tit. Devise* 12. A custom for a feme covert to devise is void; for that she has no property. 1 *Sid.* 161. *Winch* 8. Where a custom is for the benefit of the estate, there a custom to charge it may be good; because of the consideration of the benefit. Their being blown down by tempest, without the default of the servant, shall excuse him from a forfeiture of his estate; but why for this shall the lord * lose his property; for before they were blown down, the property was in the lord, &c. *Godb.* 234. This is a privilege too great for the estate of the copyholder for life, and so a void custom. Mr. *King*. 'Tis not unreasonable, that at the original grant there might be a special agreement between lord and tenant, that he should not be liable to be entered upon when any such accident happened; and in consideration thereof, he might possibly promise to plant young trees, or do some other act, &c.

* P. 95.

Holt. 'Tis agreed, a copyholder has a possessory property, and when his possession is gone, his property is gone; now shall the severance transfer the property, &c. *Powell*. Suppose a custom,

if

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Frank-bank. If the house fall, the materials should be the tenant's, could that be good? Again, shall the act of God do a wrong to the lord? Frank-bank was to encourage the tenant to go into the wars; if they were killed, the lord would not take the benefit, but gave the estate to the wife, to encourage them to fight; and this *Powell* thought was the original of frank-bank.

Queen *versus* Dr. Drake.

Vide ante,
78, 84.
Variance be-
tween *not*
and *nor*.
2 Salk. 660.
3 Salk. 224.
Holt 347.
Ec. 425. S.
C.

(4.) **GOULD.** As to the two points; *First*, Whether this be a libel: He was of opinion the words were a libel. *Secondly*, If there be such a variance between *not* and *nor*, as to make it a material variance. 1. This is the case of a libel founded upon a writing, and not like the cases of words; for there 'tis sufficient to find words to be actionable. *Reg.* 169. 2 *Cro.* 407. *Dyer* 75. 2. The words are materially different; for the one is a negative copulative, and the other has a different sense. There is a difference between an action founded upon a deed, as debt upon a bond; there, if there be a variance, one may plead *non est factum*; not so here. So he concluded that judgment ought to be for the defendant.

Powell. 'Tis a libel, and a very virulent one. And this variance is not a meer slip, but such an one as will occasion a judgment for the defendant. *Not* may begin a sentence, * but *nor* cannot; it is a relative, and of another part of speech. If the court was not to stop at a word, where would be the *ne plus ultra*. *Hob.* 179. *Yelv.* 46. 1 *Roll.* 2 *Cro.* 408. *Obj.* In declarations for words, you say *in hæc verba Anglicana sequenti*. viz. which is as strict as *secundum tenor sequenti*. *Ans.* Words are *quasi* in the air, but *literæ scriptæ manent*. Again, in an action the scandal is the matter; here, the writing, &c. *Cro. Car.* 328. 11 *Rep.* 131. The word *tenor* is by constant usage become a law term; and is to be an exact copy, according to the case of *The King and Bear.* *Reg.* 169. 1 *Sid.* 155.

* P. 96.
•
"Tenor quid.

Powell. The consequences might be ill, in giving a loose in such cases as these; tho' the difference seems small and trifling; for if Judges have such a power, it may be carried to cases of treason, and endanger mens lives by inferences. The books are full of the learning of variance material and immaterial; but you do not count there upon the tenor, but upon the record in general, as in words, &c. *Ad effectum* is not good. In law there cannot be a tenor of words; for there is no original to compare the tenor by; for the words remain only in the *idea* of the mind. 7 *H.* 6. 18, 19. If the tenor be a copy, which must be intended a true copy, then how can the tenor admit of a variance, be it material or immaterial? A man may declare for more, but if

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the jury find the very words that are actionable, 'tis good. *Dyer* 76. He thought the case of Sir John Sidenham a little shaken. *Cro. El.* 503. In *Car. II.*'s time, there was an act, that to say the king was a papist, a *præmunire* should be incurred: Suppose a man had been indicted, and a jury found, that he said he believed the king to be a papist, he could not have been found guilty; for to say, I believe a man to be a papist, is not so much as to affirm him to be one; for the latter implies a knowledge of his own. He thought it not proper to extend cases of this kind, for fear of the dangerous consequences; and that judgment should be for the defendant.

Holt. The question is, If this is such a variance from the information as to make him not guilty, &c. 'Tis such a variance. 1st, If a libel be set forth in these *English* * words, a variance * P. 97. spoils the whole information. 2^{dly}, The tenor is the same, as if it had said *in his Anglicanis verbis*. *5 Co.* 53. *2 Saund.* 121. If it had been in *Latin*, it had been good; because the matter and substance is described in the form of that case; but in this case 'tis distinguished from any other matter and thing, by the description and by the words, *secundum tenorem sequent*'. *Dyer* 203. No difference 'twixt transient actions founded on wrong, and words; for words are an injury. Suppose the jury had found no title to the libel, whereas the attorney had set it forth and described it with a title, it had been naught. What rule shall the court be guided by? 'Tis true, the difference is trifling, but where shall we stop, if we begin to allow of any variations in such cases. *Note*; *2 Cro.* 32. *Yelv.* 152. were cited for declarations in words for more than is found.

Judgment *pro def**, but a writ of error intended.

Queen versus Smith.

(5.) **T**HE defendant was in execution in *Newgate*, at the suit of the queen, viz. upon an extent, and 'twas moved, that this court would grant a *hab' corp*' to bring him here, that the bail might discharge themselves; but this motion was strenuously opposed by the Attorney-general; for that the queen, by her prerogative, should have the election of her gaol; and if he came here, 'twas only in order to be turned over to the marshal, which he insisted on the court could not do: But the court seemed inclinable to give the bail an opportunity to surrender him, and to commit him to the marshal, as well for the queen as the party. *1 Cro.* 389. *Dyer* 297. And accordingly the court did turn him over for this, and for all other actions for which the plaintiff might declare against him in this court.

The queen's debtor in Newgate, turned over to the marshal. *1 Saik.* 353. S. P.

* P. 98.

* Brown *versus* Dyer.

Customary
descent to
the younger
son. 2. If
the wife's e-
state for life
shall break
the descent to
the elder.
Ante 70, 73.
Post 107.
Holt 165,
166. S. C.
and see 5
Burr. 2764,
276.

(6.) **EJECTMENT.** *Dyer* seised in fee according to the custom, which is for lands to descend to the younger son, and the wife to have an estate during her life. The father had issue a son by one venter, and another by another venter; the father dies; the wife enters, and then the youngest son dies without issue. 1. Whether the intermediate estate of the wife so broke the descent from the younger son, as to make the elder son of the half blood to the younger, incapable of inheriting.

Raymond. This is no more than if the younger son had never been born; and the elder shall make his title from his father, without taking notice of the brother. *Cro. Car.* 410. *W. Jones* 361. Where a custom does not provide for collateral matters, it shall be guided by common law. 4 *Co.* 92. *Moor* 121. 1 *And.* 31. The estate of the wife is a continuance of the estate of the husband. 1 *Lev.* 172. 1 *Sid.* 267. If that case in *Lev.* be law, 'tis this very case; And in this case, there is no title found for the defendant, then the possession is a right against all, except him that has the meer right. *Eyres cont.* 'Tis true, the possession is found in the plaintiff, but that was not intended to be insisted on, but the very title: Besides in this case the court will allow of an amendment. But then *Holt* said, You must go before the judge that tried the cause. Two things ought to be found; the ancestor's dying seised, and that this was the youngest son. *Holt.* Suppose he has but one son, then he shall take by the common law. The ancestor must die seised, and there must be a younger son; and should the ancestor be disseised, and die, the right would descend to the eldest. Whenever a right of inheritance is vested, the defendants shall take *jure representationis*. 1 *Roll. Abr.* 623. In this case the father surrendered in tail, and the heir was admitted generally in fee; but this admittance shall relate to the surrender which bound the land. *Moor* 29. * 1 *Roll. Abr.* 504. 2 *Cro.* 100. 1 *Inst.* 59. 4 *Co.* 22, 25, 28. 2 *Roll.* 383. The heir is a complete copyholder before admittance; and his possession will make a *possessio fratris*. *Raymond.* Perhaps the minute-book may warrant the amendment; where the custom is not express, there the common law shall guide; and there, if there is but one son, the common law shall have the preference, and he shall take by it; which is an establishment of this assertion, that collateral matters shall be guided by the common law.

* P. 99.

Holt.

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Holt. If a man surrenders his estate to the use of himself in tail, and dies, the heir has two rights in him, either to be admitted in fee or in tail. *Powell.* This customary estate for life he compared to the case of the freehold, which hindered the descent of the demesne and freehold. And the court seemed to incline strongly to construe the descent according to the common law. *Holt.* If the father be disseised and dies; in *Bur' Engl'*, the right is in the youngest son; yet at least the heir shall enter, and then the younger son shall re-enter. If a rent-charge be granted *de novo* out of land in *Kent*; or *Burrough English*, the rent shall descend according to the land. *Adjorn'.*

(7.) An action upon the case was brought for dispersing a paper, accusing a gentleman, that he should say, *He could see no probability of the war's ending with France, 'till the little gentleman on the other side of the water was restored to his right, (innuendo, the prince of Wales.)*

Libel by innuendo, by pictures, &c.
2 Salk. 225.
Holt 422.
S. C.

Holt. A man may justify in an action upon the case for words, or for a libel; *secus* in an indictment. The innuendo will not make an action upon the case for a libel good, if the matter precedent is not certain, or importing scandal, &c. to the damage of the party. If a man is in treaty with a woman to marry, and another tells him, she is under a precontract, this does not import a scandal; but yet, if 'tis false, an action will lie. In case upon a libel, 'tis sufficient if the matter is reflecting; as to paint a man playing at cudgels with his wife. The court were unanimous, that this was certain enough, * without the innuendo. * P. 100. *Powell* allowed the books to be law, that where the precedent matter is not certain, the innuendo will not help.

Queen versus Soley & al.

(8.) **I**NFORMATION; for that the defendants *riotose & route* assembled themselves together, and hindered the mayor, &c. to elect a bailiff. The exceptions taken were, That it did not appear what office this bailiff was, and so this does not appear to be a crime; and the addition of the words *riotose, &c.* are only aggravations. 3 *Mod.* 3. Sir Robert Atkins's case. To make a person guilty of a riot, there must appear to be an unlawful assembly of three or more persons, with an intent to do an unlawful act, which must be done; so *Hale Pl. Cor. & Coke.* The verdict will not help in this case; for the finding of the jury to be done *riotose*, will not make it so; if the chief fact does not appear to be so, the verdict will not help. *Brook Riots.* 3 *Cro.* 697. 3 *Inst.* 176. 2 *H.* 7. 10. The manner of doing a lawful thing may be unlawful. *Lambart pa.* 163. Though this is an unlawful thing, yet it is no riot. 3 *H.* 7. 1. In an indictment of riots, an unlawful assembly must be laid *in terrorem populi*

Vide post,
115.
2 Salk. 595.
Holt 353.
S. C.
Hawk. P. C.
157, &c.

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populi regis. 3 Cro. 489. 1 Keb. 623. 12 Affize 32. The case following Serj. Broderick cited, to shew that cofinage is a good cause of challenge, even by the party that is cofin; for if the court sees there may be partiality, though the parties consent, yet the court ought not to suffer it, lest justice should not be impartially administered. 21 Ed. 4. 21. Moor 553. 3 Cro. 663.

Holt. 'Tis not the adverbs *riotose* & *routose* will make the offence, but it ought to appear what the crime is. Solicitor General cont. 'Tis objected, that the parties cannot waive the benefit of challenging by reason of cofinage. Answ. If the law gives a man a benefit, he may renounce it; an alien shall have the *medietatem linguæ*, but yet the court shall not grant it *ex officio*, but the party * ought to pray it. Dyer 107. He agreed, that if no fact was charged, the word *riotose*, &c. would not make it a riot; but then it will amount to a misdemeanor, and they are found guilty. If people, that have nothing to do with the corporation, will *clamoribus* & *vociferationibus* hinder that election, this is a misdemeanor. Holt. Never think to help an indictment by a verdict. Eyres. 'Tis a good information for a riot; To the first objection, That 'tis not set forth to be an unlawful assembly to an ill intent. Answ. This is not necessary, but the doing the act is the thing; and therefore it must be intended to be done to that end, by the shouting, &c. Raft. Ent. 383. 1 Keb. 295. For the act could not be done unless they were so assembled. Another objection was; It does not appear that the burgesses were doing a lawful act, and so the hindering could be no offence. Answ. It appears they were a corporation, and if the bailiff be chosen only to be their receiver, yet 'tis unlawful to hinder their choosing him. Reg. 106. Trespass may be by threatening. Reg. 94. and a riot may be *clamoribus*. Raft. 662. And tho' the bailiff be a private officer, yet it would be a trespass to hinder the doing it; and if the hindering were by many, 'twould be a riot. 2 Cro. 606. 'Tis not usual to shew the manner of the fact; the *riotose* will not make the fact a riot, if the special matter in the indictment shews it to be none, which he said would answer Sir Rob. Atkins's case: For there the special matter shewed the nature of the offence to be other than 'twas laid. Holt. Surely it ought to be laid, that the assembly came together to do an unlawful act; but if they came there accidentally or lawfully, if two or three do an unlawful act, or make a clamour, the rest are not guilty; *secus* if they came together on purpose. It does not appear that he was a publick officer, indeed it is not necessary to shew their constitution. Is hindering their election such a publick offence as to make it a riot? If 'twas an assembly of people together *in terrorem populi*, as in the highway, this without more is a breach of the peace

* P. 101. in general; * But hindering their election is in the nature of it only

1

only † particular. *Holt*, in answer to *Broderick*, objected, That no man has reason to complain of his kinsman's being on the jury; why the reason that knights were to be on the jury, when a peer was concerned, was for the security of the commons; for a knight was presumed to be a man of courage, and not afraid to look a peer in the face. *Powell*. 'Tis true, knights are for the privilege of peers, but yet for the security of the commons. We must distinguish between crimes; he agreed to the definition of a riot *ut supra*. An affray, riot, and unlawful assembly, are different offences, and consequently different punishments. *Holt*. If I am writing a letter, and three or more come hollowing and jogging me, is this a riot? No; it ought to be *in terrorem populi*. *Adjornat*'.

† Corporations by charter are generally supposed to be for the encouragement of the trade in that corporation, and consequently an advantage to the publick; and must be so intended by their having a charter, which is not

to be supposed to tend to a private advantage; if so, then to commit an offence against a corporation, which is acting for the benefit of trade, and by a charter, is a greater offence than the same act in the highway, which has only the protection of the crown for the benefit of trade, without a charter.

Smith and Tindal.

(9.) **MAXIMILIAN** Taylor seised in fee devises to the poor of Sutton 40s. to be distributed by his executors, with four coats, and four hats, upon every 21st of Nov. for ever; makes his wife Margaret executrix; and also devises all his lands, tenements and hereditaments, and all his personal estate, to Margaret the executrix, who marries with one Archibald Tindal; and the husband and wife by indenture, &c. covenant to levy a fine *sur cognizance de droit come ceo* to the use of them two for their lives; remainder to Archibald and his heirs, with warranty, who conveys to the plaintiff. *Gould*. The first point is, what estate is conveyed by this will? whether an estate of inheritance. 2dly. If the warranty binds. As to the first he held it a fee, because of the words of perpetual charge. *Co. Lit.* 8. The personal estate is not, in the eye of the law, a sufficient estate to answer a perpetual charge. *Trin.* 28 *Car.* 2. *Rot.* 987. 2 *Jones* 113. He would not speak as to the force of * the word *hereditament*, but went upon the perpetual charge; and so would not speak to the warranty. *Powis*. This being in a will, Q. if the word *hereditament* will carry a fee; and then if the perpetual charge will not make it a fee, according to *Collier's* case. And 3dly, If this collateral warranty will not bar the rebutter. Lastly, If this warranty can be given in evidence. As to the first he thought it might. There is a difference between the word *inheritance* and *hereditament*; the first denotes the interest, the latter describes somewhat that is not a tenement; but in this case we are on a will, and so not to go to the learned and strict signification, but for the common parlance and intention. *Cro. Car.* 447. 1 *Jones*

Lands and hereditaments devised to an executrix, in trust, &c. carry a fee. 2 *Salk.* 685. *Holt* 235. *S. C.*

* P. 103. Hereditament.

308. *Cro. Car.* 450. *1 Saund.* 380. *Moor* 873. *Hob.* 2. To the second point of the charge, the will says, *to be delivered by my executrix and her assigns*; which must be construed as if to his wife and her assigns; for it seems to regard her not only as executrix, but as his wife personally, who was the devisee: Then the warranty secures the plaintiff's title. *Vaugh.* 392. *Hob.* 27. *Brook tit. War.* 31. *19 H.* 6. 59. *Powell.* Judgment ought to be for the plaintiffs, chiefly on the warranty. A devise of all my lands, tenements and hereditaments, he could not allow would carry a fee, as *Powis* held. The word *hereditament* doth not signify the estate, as inheritance doth. Devise of 100*l.* *per annum*, paying 40*s.* a year for ever, must be a fee of the perpetual rent. *Cro. Jac.* *1 Roll. Abr.* 835. *10 Co.* *Seymour's* case. A collateral warranty may be taken notice of, as well by evidence as by rebutting. He agreed, a warranty does not give a right. *Fitz. Droit.* 29. *Lit. Sect.* 708. Collateral warranty attach'd does not extinguish the estate tail. Collateral warranty neither gives nor extinguishes, but binds the right, and so the entry is wrongful, because the right is bound. If tenant for life levy a fine, the fine gives a fee, but then tenant for life commits a forfeiture. *Holt.* Judgment *pro quer'*. The words of the will give a fee. Here being a general charge for ever, and a sufficient personal estate to purchase, &c. But he was not satisfied to fix it upon the land. He went upon the word *hereditament* * to make a fee; the words *lands and tenements* carry only an estate for life, but hereditament carries the fee; for if he had not a fee, then it was not his hereditament; and when he gives his hereditament, he gives a descendible estate, otherwise 'tis no hereditament. *Co. Lit.* 6. These words cannot be satisfied, unless this word carry the inheritance! *Hob.* 2. is rightly reported, and wrong in *Moor* 873. Lands of inheritance is only a description of what lands shall pass. Touching the warranty: If a disseisor continues possession twenty years, and the disseisee enters, or brings an ejectment, the disseisor shall maintain his possession, by the statute of limitations; for he has acquired a *jus possessionis*, tho' not a right to the inheritance.

Collateral warranty.

* P. 104.
Hereditament imports a fee.

1 Burr. 119.

* Hil.

Hil. Term, 1706.

5 Annæ Reginae in B. R.

Annelly and Dixon.

(1.) **E**RROR of a judgment in *Ireland*: The question was, Whether the late *Irish* trustees, authorized by act of parliament to inquire of the forfeited estates, had the sole power in them of judging what were forfeited estates, and what not? Or, whether that might be found by a jury? All the judges but *Powis* held, that point ought to be decided by a jury.

Error from
Ireland.
Vide ant.
This case is
very fully re-
ported in
Holt 372,
&c.

Holt's opinion. It appears that all the private estate K. *James* had at the day he came to the crown, and all the * forfeited * P. 105. estates, are vested in the trustees; and these estates were designed to be sold for the purposes in the act; and the person or persons seized of such lands are by this divested, tho' upon never so valuable a consideration. If a forfeiting person had only a right of action or entry, yet this is vested in the trustees; the like of a condition. If the forfeiting person had an estate for life or remainder, such estate and such only is vested. If a person is disseised by K. *James*, the disseisee is bound to make claim; which shews this is a special and particular jurisdiction of such and such lands. All jurisdictions are limited to place, persons, and things. Their jurisdiction here, arises from the lands vested. The statute vests such lands as really were K. *James's*; but not such as they should say were vested; and the statute gives them no other jurisdiction. But to say, the trustees had a power to say, an innocent person's estate should be liable, &c. would be a *bellish* construction, and such as the parliament of *England* could never intend. If they cannot know what were the King's lands, they cannot inquire, and therefore they ought to inform themselves aright; for a man can purchase no better or other estate than the attainted person had. *Powis* said, the jury have nothing to do with it; this is begging the question. For a jury are to inquire whether the lands are vested? and if they were not vested, the trustees had no jurisdiction, and 'twas *coram non judice*. 10 Co. *Marshalsea* case.

Hilary Term 5 Ann.

case. Suppose a man brings a *formedon* here, and the tenant admits and pleads, and then another is brought in the Common Pleas, the tenant cannot plead this here in bar; for 'tis void here, and *coram non judice*. So the judgment in *Ireland* was affirmed, contrary to *Powis*.

* P. 106. * St. George's Southwark *versus* St. Margaret's Westminster.

Poors settle-
ments.
Children ba-
stards, if born
after divorce.
Co. Lit. 235.
2. Salk. 123.
1 Salk. 123.
Fortes. 315.
Black. 237.
Set. & Rem.
154. S. C.

(2.) ORDER of sessions. Three children born in St. George's parish, on the body of *Margaret Bilby*, wife of *George Bilby* an inhabitant of St. Margaret's Westminster. The inhabitants of St. Margaret's alledged, that the mother was a lewd woman, and was divorced from her husband, and had the children a long time after the divorce; but the justices sent them to St. Margaret's, Westminster, seeing the husband lived there; supposing that to be the place of their last legal settlement. Serjeant *Broderick* moved to quash the order; for that the children were bastards. *Holt & alii just*. They are bastards, being begotten by an adulterer after a divorce. 'Twas objected, It did not appear by the order but that the husband got them. *Holt*. We will intend the contrary, unless you can prove their cohabitation. But being of great consequence, *adjoin*.

Bronker versus Coke.

Lands devis-
ed, whereof
the devisor is
not seised.
Post 121,
148.
Holt 236,
Ec. 746.
Fitz. Gib.
225.
1 Salk. 237.
S. C.

(3.) IF lands shall pass by a devise, that the devisor was not then seised of, is the question. *Raymond* cited 3 Co. 30, 31. *Dyer* 158. 10 Co. 83. And urged, That no law supports my *Ld. Coke's* opinion; and the opinion of *Dyer* was only *obiter*. The resolutions on the statute as to the word *having*, Co. Lit. 111. b. *Coke* in his comment does not take notice of the opinion of *Lit.* as to the custom, That any man seised of lands may devise. He might as well devise lands to be had as *ebattels*, from the nature of the writ *ex gravi querela*. *Fitz. N. B.* 193. *Plowd.* 343. *Mich.* 39 H. 6. 18. *Fitz. Devise*, 17. *Bro. Dev.* 15. *Lit. Sect.* 167. Besides, he was seised of them before the devise took effect. Serjeant *Parker contra*. These lands were purchased nine years after the date of the will. Here are two points. * 1st, A want of power in the devisor at the time, &c. as not being seised. 2^{dly}, As to his intent; which may well be doubted, if it were to pass these lands. Heirs are to be favoured; and this would be to carry a will further than a deed, or a man's grant: He cited *Co. Lit.* 327. b. that the exposition of this statute ought to be according to the reason of the common law; and

2 And.

Mich. Term 5 Ann.

2 And. 12. Dyer 154. If persons, idiots, infants, &c. had not been named, yet, being disabled by the common law, they could not have devised. The common law will not allow it good when he has it not. For a man cannot judge right as to future things. 1 Inst. 47. Dyer 49. a. Heb. 45 & 156. Litt. Sect. 446. Hob. 132. 3 Cro. 401. A covenant to stand seised to uses of lands which a man has not, is void. 2 Roll 190. Adjourn'.

Anonymous.

(4.) **PER Cur'.** A writ of error allowed by the chief justice, or clerk of the errors, is a *superfedeas*; tho' the attorney of the other side has no notice, and the notice is only to bring him into contempt. 6 H. 4. 14 or 15. Godbolt. 439.

Writ of error a *superfedeas*, sans Notice.
Post 272.
3 Lev. 312.
1 Ventr. 30.
1 Burr. 340.

Brown *versus* Dyer.

(5.) **DYER**, seised of copyhold lands in fee, in nature of *burgh English*, surrendered to the use of himself for life; remainder to his wife for life; remainder to the heirs of their bodies. *Per cur'*. When a copyholder surrenders to the use of himself for life; remainder to the wife for life; remainder to the heirs of their bodies; altho' there is no admittance pursuant to this surrender, the son shall have a fee-simple; for his father's estate continues in the same plight, &c. The court seemed clear, that the customary descent should be governed by the reason and rules of the common law.

Customary descents guided by the rules of common law.
Ante 70, 73, 98.
Holt 165, 166. S. C. and see 5 Burr. 2764, &c.

* Tuckerman and Jefferies.

* P. 108.

(6.) **TRESPASS**; not guilty; special verdict; *Somaster*, seised in fee of the *locus in quo*, made a will thus: *Item*, I give unto the wife of *Tho. Jefferies*, and *Elizabeth* the wife of another, all my estate, to be equally divided between them for their lives; and after their deaths, to the right heirs of one of them. The quest. if this be a joint estate, or if they are tenants in common? *V. Stile* 211. Adjourn'd till next term, to be argued.

Jointenants or tenants in common.
Vide infra.

Easter Term, 1707.

6 Annæ Reginae in B. R.

Tuckerman *versus* Jefferies.

Where a devise to two equally, &c. is a jointenancy.
Holt 370.
S. C.

(1.) **D**E VISE of all my estate to my two nieces, to be equally divided between them, during their lives; and from and after their decease, to the right heirs of one of them.

Mr. *Eyres*. That this is a joint estate. To be equally divided is a quality of a jointenancy, as well as to a tenancy in common; and the words *to be equally divided* is what the law implies. *Stile* 211. 2 *Roll Abr.* 90. 2 *Leo.* 70. If this should be construed, that they should take by moieties, it may happen that the right heirs of the one may never take the whole; because the remainder, *quoad* the moiety, is contingent. 4 *Leo.* 14.

* P. 109. * *Pengelly*. Here are not subsequent words of sufficient force to over-turn and weaken the force of the former words; and upon this the distinctions run. 3 *Leo.* 373, 374. *Style* 434, 435. *Raym.* 452. *Dalison* 77. If it be joint, then the heir may lose his moiety during the life of the other, which will be equal to the contingency.

Holt. The cases Mr. *Pengelly* cited, as to the words *equally divided*, run on this reason, That if they did not make a tenancy in common, they would signify nothing. He agreed to the case put by *Eyres*, of the contingency. The opinion of the court seemed to be, That it was a jointenancy; by reason of the danger of the contingent remainder, which otherwise might be lost. *Adjournatur*.

Note; In *Trinity* term following, *Holt* Ch. J. delivered the opinion of the court, that this was a jointenancy, by reason of the contingent remainder.

Queen

Easter Term 6 Ann.

Queen *versus* Lord George Howard.

(2.) **L**ADY *Howard* exhibited articles of the peace against her husband the defendant; whereupon he was bound to keep the peace for a year. Sir *Edward Northey* moved to discharge the recognizance, upon a suggestion, that my Lady was consenting; and his being bound was upon her prayer.

Security of the peace extends to all men.
Bro. tit. peace, pl. 17.
4 New Abr. 695.

Holt. How can we discharge it before the condition is performed? Besides, if my Lord breaks the peace upon any one else, 'tis a forfeiture of his recognizance; and so denied the motion.

Mr. H — t's *Case*.

(3.) **N**OTE; In this case *Holt* Ch. J. declared, That whenever a copy of a deed shall be allowed as evidence, there the inrolment of a deed for safe custody shall be so allowed; and a copy of a deed is good evidence, where the deed is lost, burnt, &c. or is almost worn out, * or obliterated; because in those cases there is plain evidence of the deed it self. But the evidence of a copy of a deed *inrolled* is only *conclusive* to those that acknowledge it; therefore 'tis necessary for all the parties to acknowledge it, and then it amounts in effect to a *new deed*; but 'tis also necessary, where a man's evidence consists in such copies, that he has a covenant from the party that has the originals, to produce them whenever he may have occasion for them.

Enrolment of deeds where evidence.
5 Co. 54.
Styls 445, 462.
1 Keb. 117.
1 Salk. 280.
* P. 110.

Queen *versus* Standish.

(4.) **M**R. *Eyres* moved to quash an order of sessions; which was to force an administrator to refund the money the intestate received with his apprentice; which was to the trade of a barber-surgeon. He took two exceptions; The one that a barber-surgeon is no trade named in the statute; nor was it a trade at the time the statute was made. He cited a case adjudged so, of an indictment against one for using the trade of a merchant-taylor; which indictment was quashed. The other that it would be of dangerous consequence to charge an administrator. And of this opinion the whole court seemed to be strongly; For how can the justices examine the matter of assets? And their order is not like a judgment, which an executor may plead, and which is always *de bonis testatoris*; but in this case they must attach the party himself. Serjeant *Cheshire* argued, that there is a general clause that extends to all trades; and that a decree of a court of equity, and an order of sessions, are in nature of judgments; and would be allowed of in a plea by the administrator; which

Sessions cannot order an administrator to refund.
1 Salk. 66.
Finch's Rep. 396.

Easter Term 6 Ann.

Certiorari. which the court in great measure denied; for no writ of error lies in either case. To this *Chebbire* urged, That a *certiorari* is a writ of error, &c. *Et adjorn*'.

* P. 111.

* Anonymous.

Copy of
court-rolls
refused by
the lord.
Post 134.
2 Str. 1203.

(5.) **B**Y *Holt* Ch.J. If a lord of a manor refuses a tenant a sight of a copy of a court-roll, to make such use of them as the tenant may think proper, either to ground a fine upon, or make his defence: He said, *Hale* was of opinion, an attachment should go against the lord. The like law as to a corporation; *quoad* the inspection of books.

Lord Herbert versus Shaw.

Motion for a
new trial.
Post 118.
2 Ventr. 173.
Str. 643.

(7.) **S**ERJEANT *Braderick* moved for a new trial, upon a letter under the Duke of *Leeds* his hand, to influence a juryman, to this purpose, That he should think himself obliged to him, and would quit the obligation whenever 'twas in his power, &c. he cited *Moor* 816. *Noy* 102. 2 *Inst.* 484. *Sir Edward Northey contra.* Writing letters to gentlemen, to desire them to be ready, and to solicit them to attend, is grown into a constant practice; and must be allowed of, so far as it tends only to solicit to get a full jury. He produced an affidavit, that the attorney on the other side had notice of that letter before the trial. *Raymond.* 'Tis only a letter to the gentlemen to come and do their duty, and to attend; and tends to no discovery of the matter of fact, nor to prepossess the jury; and the conclusion is only an usual compliment, Which I shall take as a great obligation, and shall be glad of an occasion to shew how much I am your humble servant. *Holt* ordered the attorney to be sworn, if he knew any thing of this letter before the assizes; he was sworn, and said, he did not know of it, any otherwise than as a flying report. The court thought this letter something more than the usual compliment. The Duke of *Leeds* was a stranger to the issue, but he was a remainder-man, and so might maintain, as a father might maintain lawfully * for a son. *Holt.* But a father ought not to make use of his authority or nobility for his son. Lord *Herbert's* Lady was the Duke of *Leeds* his daughter. But the opinion of the court seemed to be, not to grant a new trial. *Sed adjournatur.*

* P. 112.

Easter Term 6 Ann.

Trevillian *against* Pine in C. B.

(8) **L**ORD Ch. Just. *Trevor*. Judgment of the court, that the being bailiff in replevin, or in avowry, is traversable; 3 *Lev.* 20. 1 *Leo.* 50. 2 *Leo.* 206, 207. for otherwise a man might be twice charged; for suppose in the avowry damages are given; then suppose the lord brought trespass, and the tenant pleaded the recovery in the replevin, this shall not conclude the lord; for 'twould be very mischievous that the lord should be concluded, and not be able to say that he was not his bailiff, and had no authority either express or implied. 3 *Cro.* 14. That difference in *Cro.* he agreed was an authority against him, but the books above cited are all to the contrary, and so 1 *Roll. Rep.* 46. Also a difference betwixt trespass, *Yelv.* 148. for *clausum fregit*, and for taking cattle; in the one case, not his freehold, is a good plea. *Sed non è converso*, for I may have property in the cattle, *Bro. tit. Trav.* 3. Bailiff or not bailiff may be given in evidence, *a fortiori* pleaded. An agreement or consent subsequent will amount to an authority, &c. And the whole court agreed that 'tis traversable.

In replevin, the being bailiff, traversable.

This case is well reported in 1 *Salk.* 107.

Hoskins *and* Lee.

(9.) **A** Motion was made for a prohibition to the spiritual court, upon a libel there for these words, *he is a great rogue, as great a rogue as ever was hang'd; and deserves to be hang'd more than Dr. Pims*. A prohibition was granted, because no spiritual defamation.

Prohibition in scandal. 3 *Lev.* 119.

* *Holt* said, If *A.* call'd *B.* a son of a whore, he cannot libel in the spiritual court; but his mother may, because in this case 'tis no spiritual defamation to the son; but 'tis to the mother. * *P.* 113.

Queen *and* Hickingill.

(10.) **HICKERINGILL** was indicted and found guilty of a misdemeanor, in altering an assessment, which he with the other commissioners signed in pursuance of the land-tax act, which was enacted at a sessions of parliament, held in *November, quarto Annæ reginæ*. Exception was taken, that in the indictment the act was not well set forth; for tho' the writs of parliament were returnable the 14th of *June*, the time mentioned in the indictment, and right according to the printed book, yet being prorogued till *October*, the sessions did not commence till then; whereupon the indictment was quashed.

Act of parliament not well set forth, the indictment quashed. 2 *Hawk. P. C.* 246, 247.

Easter Term 6 Ann.

Queen and Harris.

Indictment
good for part,
and void for
the rest.
Post 121.
Holt 353.
S. C.
1 Lev. 3.

(11.) **HARRIS** was indicted for riotously entering the close of J. S. and cutting down and carrying off twenty ashes and thirty oaks, *ibidem crescentes, de bonis & catallis* of J. S. and his wife.

Pengelly for the defendant said, they could not call them *bona & catalla* of the husband and wife, and being faulty in that respect, the whole is void, and must be quashed; being different from the case in *Latch* 173. where the offences were distinct and several. *Parker contra*. They are several trespasses, and tho' void for one, yet may be good for the rest.

Per cur'. Judgment for the queen, as to entering the close, and the indictment void as to the rest. For trees growing cannot be called *bona & catalla*.

* P. 114.

* Queen versus Pawlett.

Indictment
for not exe-
cuting a war-
rant.
See 29 Car.
2. c. 7.
Lamb.
Eiren. 72.
and Salk.
380.

(13.) **A**N indictment against *Pawlett*, for not executing a warrant of a justice of peace upon a common baker, for exercising his trade on a *Sunday*, contrary to the act. Exception to the indictment, that it does not appear the conviction was within ten days after the fact, which is the time limited by the act; the indictment said only *d. bito modo convictus*.

Holt was of opinion, that since 'twas said that he was convicted, it shall be taken for a good conviction in all respects; and the defendant should have taken advantage of the contrary, by shewing it in evidence upon the trial.

'Twas agreed by the court, that for things unnecessary, as puddings and pies, for baking them an indictment will not lie on the statute; but for baking bread it will.

Sed quære differentiae rationem?

Triu.

Trin. Term, 1707.

6 Annæ Reginae in B. R.

The Queen *versus* Lady Oglethorpe.

- (1.) **I**NDICTMENT for high treason upon the statute of *Jac. 1.* For converting her servant maid to the *Roman* catholicick religion. Not guilty was pleaded; and upon the first day of the term, the attorney-general came into court and confessed the plea to be true, by * a special mandate from the queen; whereupon she was discharged.

Indictment
on the statute
of recusancy.
Ante 56.
Goddard v.
Smith.
* P. 115.

Queen *versus* Soley, &c.

- (2.) **T**HE defendants were convicted upon two informations for riots: The first was for hindering the bailiffs and burgesses of *Bewdley* in their choice of a bailiff for that corporation; and the information sets forth, that the bailiffs and burgesses being assembled to chuse a bailiff for the borough of *Bewdley*, the defendants *rioteuse & routouse clamoribus & vociferationibus, &c.* hindered them upon the said election.

Two informations for
tumults
quashed.
Vide ante
100.
2 Salk. 595.
Holt 353.
S. C.
Hawk. P. C.
157, &c.

The second information was for breaking open the door of the Guildhall of the borough of *Bewdley*; which sets forth, that the defendants, 23d of *October*, did assemble themselves to disturb the peace, & *sic assemble* did break open the door of a certain house, *vocat* the Guildhall of the borough of *Bewdley præd*.

The two informations were moved in arrest of judgment; and after several solemn arguments,

Holt Ch. J. delivered the opinion of the court this term, that both the informations were naught, and judgment ought to be arrested.

The first not good, because it did not appear what authority they had to chuse a bailiff. But if people have a lawful authority to chuse a member of a corporation, and above two come with clamour and noise to disturb them, it will be a riot, and 'tis a trespass; so 'tis of any franchise, dean and chapter, &c. 29 *Ed.* 3. 18. *Register* 103. But in this case it does not appear they had

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had authority, which should have been shewn, either by charter or prescription; 'tis their having a right to elect that makes this an unlawful act. If they had no right, it would be no riot; but their having a right, and the defendants acting in opposition to this, in a tumultuous manner, makes it a riot; but here the plaintiffs right does * not appear. Therefore judgment must be arrested on the first information.

* P. 116.

Then as to the second information, 'tis ill; because it does not shew whose house it was. 'Tis said, they broke open the door *cujusdam domus*; 'tis very well known that in a declaration, it would not be good to say, that he broke open the door *cujusdam domus*, but it must be *ejus domus*, to make it appear to be the house of him that brings the action; indeed in an indictment for stealing a horse, it has been held well to say, *equum cujusdam ignoti*, because it appears that 'tis not his own; and there the indictment well lies. But to make a riot, there must be an assembly, and an unlawful act done. It has been objected, that 'tis said to be in the Guildhall of the borough, and that would be tantamount, and like the case of a riot in a church. To which I answer, 1st, It does not appear to be the Guildhall of the borough, it only saying *vocat* Guildhall is not enough, for it does not describe the thing; and besides, it should have been in *Latin*, according to 36 *Ed. 2.* otherwise it stands for nothing. 10 *Rep. Osborn's case*. And then taking it that Guildhall is left out, 'tis no more than if it had been said they broke the door *cujusdam domus*.

2^{dly}, If it had been sufficiently described to have been the Guildhall of the borough of *Bewdley*; yet it might not be the Guildhall of those people thus assembled; for boroughs may belong to lords of manors, many boroughs are manors, and a Guildhall may belong to the lord of a manor.

The books are obscure in the definition of riots; I take it, 'tis not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, *in terrorem populi*, tho' no act is done, 'tis a riot. *Hob. 91.* If three come out of an alehouse and go armed, 'tis a riot. 3 *H. 7. 1.* Tho' a man may ride with arms, yet he cannot take two with him to defend himself, even tho' his life is threatned; for * he is in the protection of the law, which is sufficient for his defence.

* P. 117.

It has been objected, that in this information 'tis not said *in terrorem populi*. To which I answer, that in this information 'tis well without it; for in those riots, which are riots without any act done, as going armed, &c. it must be said *in terrorem populi*; but when an act is done, 'tis otherwise. Sir Robert Atkins's case is no riot, because he went to claim a right. If several, thinking they have a right to elect, meet to assert their right, if they do not do it in a violent manner, 'tis no riot.

3 Mod. 3.

2 Show. 236.
S. C.

Trinity Term 6 Ann.

If a convenient number go to claim common, which is inclosed, and they pull down the inclosure, 'tis no riot; because they go under a claim of right.

'Tis not necessary to say, in an information, that they assembled with an intent to commit a riot; for to say they assembled *riotously & routously*, and committed an unlawful act, is sufficient, for that is a riot.

My lord Ch. J. *Holt* delivered this as the opinion of the court; and thereupon judgment was arrested upon both informations.

May *versus* Horle.

(3.) *A.* Called *B. bastard*; *B.* and his mother libel in the Spiritual Court for defamation, *viz.* for calling him a *bastard*, and his mother a *whore*, by implication. *Raymond* for the defendant argued, That upon a libel in the Spiritual Court for these words, *Thou art a son of a whore, and thy mother is a bitch*; a prohibition was granted, because the latter words made the former nonsense; so here, for the woman appears to have a husband. But he admitted, that for calling *whore*, without other words, a prohibition was denied; for that is merely of spiritual conformance.

But *per cur.* That according to the case in 3 *Levinz* 119. the mother may, in this case, well libel for the scandal by implication. And a prohibition was denied.

Scandal.
Whore by
implication.
Prohibition
denied.
2 Roll. Abr.
295. but vide
post 195.

* Lady Herbert *versus* Shaw.

* P. 118.

(4.) *UPON* an issue joined, in an action between my lady *Catherine Herbert*, daughter of the duke of *Leeds*, and the fishermen of *Milton*, a letter was written by the duke of *Leeds* to every particular jurymen, wherein he desires their appearance at the trial, and concludes his letter in these words, *viz. Which I shall take as a great obligation, particularly from yourself, and shall be glad of an occasion to shew how much I am, Sir, your humble servant.* Upon which the defendant moved for a new trial; and 'twas argued by Mr. *Conyers*, That none but the parties themselves can solicit a jurymen to attend, &c. and cited *Moor* 815. 1 *Inst.* 369. 2 *Inst.* 484. *Northey* for the plaintiff said, That the duke being father to the plaintiff, it could not be maintenance, &c. And *Raymond* also for the plaintiff said, That it was the defendant's neglect, in not discovering the letter before the trial, and making his challenge thereupon, since it appears that they knew of it before, and probably kept it by them as an after-refuge, in case the trial went against them, as it did; however,

Motion for
new trial
denied.
Ante 111.
2 Vent. 173.
Str. 643.

A a

the

Trinity Term 6 Ann.

the most they can make of it is but *maintenance*, which is not a sufficient cause to grant a new trial, tho' *embracery* is.

Powell Just. said, He remembered a case in *C. B.* where a stranger wrote to a jurymen to consider that the plaintiff was a poor man; for which a new trial was granted, and the writer taken up and committed: But here, this seems only an invitation, and an endeavour for a full jury to appear, in order to avoid a *tales*; and a man may write in behalf of his daughter. But the doubt with me is on the compliment here paid to the jurymen, by so great a man as the duke of *Leeds*. And he thought the fact hardly justifiable even in a father.

This case was argued in *Easter* term last, and likewise in this term; and now 'twas resolved by *Holt* Ch. J. *Powell*, *Powis* and * P. 119. *Gould*, That no new trial should be * granted; because the defendant, having notice of such a letter long before the trial, might have moved for a trial at bar, which the other side had offered to consent to: But taking the letter, as it is in itself, 'tis of dangerous consequence; for 'tis a temptation to the jury to be partial, and takes off their indifferency. But 2dly, If a party have cause of challenge, and knows of it time enough before the trial, if he does not challenge, he shall not have a new trial; *contra* if he has not timely notice of it. The party himself cannot give a jurymen money to appear; for it cannot be supposed that he will hire him to give a verdict against himself. But the motion was denied. And *note*; *Holt* Ch. J. in delivering his opinion, cited a case in *Edw.* 3d's time, where a new trial was granted, because a great lord concerned in the cause sat upon the bench at the trial.

Hardwick *versus* Gamball.

Limitation on
a condition
precedent of
a contingent
remainder,
good.
Holt 623.
&c.

(5.) A SPECIAL verdict finds, a settlement in consideration of natural love and affection to himself for life, then to trustees to preserve contingent remainders; remainder in tail male. Provided, if tenant for life die, without issue male of his wife, and having daughters, the trustees to stand seised for 31 years, with intent to raise such and such legacies to the daughters. Provided also, that if the next issue male in remainder, within five years, pay the legacies, that then the trustees should stand seised to such issue male as should pay the legacies, with remainders over; tenant for life dies without issue male or female. 'Twas objected, that if the term never accrued, the remainders are void. 3 *Cro.* 465. *Dyer* 34. b.

Holt Ch. J. Tho' the contingent term never arose, yet the remainders are good, if the precedent estate to the term for years be sufficient to support the remainders.

Eyres

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Eyres argued, That this remainder can never arise, it being a * P. 120. condition precedent, and 'tis not found that the legacies are paid; and that the remainders are void in their creation. If the first remainder be contingent, all the others subsequent must be contingent. There must be an intermediate time betwixt the payment of the legacies, being precedent to the vesting of the remainder, and so void, it not vesting *eo instanti*. 'Twas said, that the first remainder was nonsensical, *viz.* That if he died without issue male, that then his next issue male in remainder, &c. whether the term arises or not, the law to us is the same. If the condition be impossible, no estate can grow thereupon, and neither the act of God, nor the party, can dispense with this condition, if it be precedent.

Holt Ch. Just. The payment of the money was to let the issue male into possession, notwithstanding the term. And no payment was intended, unless there was a dying without issue male, leaving daughters. The clause, *and for default of issue male, remainder to the issue male*, should have been, heirs male in remainder, and then there had been no doubt. And it was adjudged, that the remainder was good, and well vested.

Issue male taken for heirs male.

Prime versus Mason.

(6.) *SCIRE facias.* Demurrer to the first writ, because it was returnable *die lune in tres septimanas Sancte Trin'*.

Writ return. Dies non, void.

Per cur'. It is a void writ; for there is no such day, it being on a Sunday, and so was not a miscontinuance to be helped by the statute of *jeofails*; and it being a void writ, the court, *ex officio*, ought to take notice of it, being pleaded in bar, and ought to quash it, and so there is no writ in being.

1 Jon. 156.
2 Lil. Abr. 874.
3 Burr. 1596.
Swan v. Broome.

* Anonymous.

* P. 121.

(7.) *T*ENANT for life, remainder in tail, remainder in fee; tenant in tail levies a fine; this has for ever hindered tenant for life, and remainder in tail, from destroying the remainder in fee; because the fine has turned his estate into a base fee, and has destroyed all privity of estate; so that if tenant for life, and remainder in tail, would make a tenant to the *præcipe*, yet they cannot vouch the remainder-man in fee, without he will voluntarily enter into it.

Where a remainder in fee not barable by tenant in tail.
1 Salk. 338.

The

Trinity Term 6 Ann.

The Queen *versus* Harris.

Trees growing, no chattels. Vide ante 113. Holt. 353. S. C.

(8.) **I**NDICTMENT for entering his close, and cutting down several trees *adunc & ibidem crescentes, de bonis & catallis* of the husband and wife. Exception, that trees growing could not be goods and chattels. *Holt.* Read the indictment, and see if it say *crescentes*, and it did not say so. But,

Per cur'. *De bonis & catallis* shall be void, as if not inserted, and the indictment is good without them; so judgment was for the queen.

Bunker *versus* Cook.

Devise of all my lands, &c. not to extend to lands purchased after. Post 148. 1 Salk. 237. Holt 236, &c. 746. Fitzgib. 225. Viner, vol. 8. * P. 122. p. 64. ca. 1. p. 66. ca. 11. 2 Eq. Ca. Abr. 295. ca. 1. Gilb. Dev. 126. S. C. But see the case of *Greenhill v. Greenhill* in Chancery, (Gilb. Caf. in Equity 77. 2 Vern. 679. and 1 Eq. Caf. Abr. 174.) which in effect was this: A testator entered into articles in April, for the purchase of an estate at Michaelmas following. In May or June he made his

(9.) **E**JECTMENT was brought for lands in *Kent*, on the demise of *Francis Bokenham*; and on not guilty pleaded there is a special verdict; wherein the jury find, That *William Eckenham*, Esq; being commander of her majesty's ship the *Grafton*, on the 3d of May, 1692, made his last will and testament in writing, which they find in *hæc verba*; he writes, that he was then bound out to sea, &c. and says, *I do hereby give, devise and bequeath to my well-beloved wife, Frances Bokenham, all such sum and sums of money as now is, or hereafter shall become due to me from their majesties for my own and servants service, either by sea or land: As also such sum and sums of money, lands, tenements, goods, chattels and state whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me: And I do hereby nominate and appoint her the said Frances Bokenham, my well-beloved wife, to be the whole and sole executrix of this my last will and testament.*

They find, that *William* the testator, at the time of making this will, was not seised of any lands in the county; but afterwards, by deeds of lease and release, dated the 20th and 21st days of *March*, in the year of our Lord 1700. Sir *George Wheeler* and others, being seised in fee of the lands in the declaration particularly mentioned, conveyed the same to the said *William Bokenham* the testator, and his heirs, by virtue whereof he became seised.

They find, that the lands are held in socage, and are of the nature of gavelkind, and devisable by the custom of *Kent*; and that some time afterward *William Bokenham* dies, the devisee enters, and the heir at law enters upon her. Now the question between them is, Whether these lands do pass by the will of captain *William Bokenham*, or not?

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Raymond (a) for the plaintiff argued, that the devise was good. He said, that this was, in a great measure, a new case: That he could not cite any case which would *directly* determine it; and therefore it must be determined, by comparing it with other like cases, and upon the nature of the thing.

A devise, in the books, is defined to be a speaking in a man's testament, of what he would have done after his decease. *Co. Lit.* 111.

In the next place, the will of the devisor is ambulatory: it takes no effect, in *reality*, till after the death of the devisor.

What the lessors of the plaintiff contend for agrees with the definition of a devise; for the devisor has shewn his meaning, plainly, that his wife should have all the lands, which he should afterwards purchase. And if the will be ambulatory, till the death of the devisor, here is a complete seisin before the time, when the devise was to take effect.

to pay the purchase-money, in case the purchase had not been completed in the time, so it was reasonable that the estate should be at the testator's disposal: And in equity had a tide from the time of executing the articles.

But this particular case being of gavelkind lands, which are deviseable by the custom, *Raymond* propounded two questions:

1. Whether it is not a good devise, within the STATUTE of 32 H. 8. c. 1. wills?
2. Whether, upon the CUSTOM, it is not good?

As to the first, the statute ought to have a favourable construction: it appears, by the preamble, to be made in ease and favour of the *subject*; and therefore ought to be construed against the *heir* at law. The design of the statute was to give power, by will, to disinherit the *heir*: And therefore care is taken, by the statute, of the *lord*, least any prejudice should happen to HIM; but it is otherwise of the *heir*: And in case of socage-tenure, all goes away.

This statute seems to be made to supply the inconvenience, introduced by the statute of uses: Before which statute of uses, a man had power to dispose of an use by will; and if a seoffment was made to the use of the will, they might shew their intent, by will, how the uses should be, and dispose of them accordingly.

In *Brett and Rigden's* case, it is said by the judge, that three things are to be respected in the intent of a will; *viz.* inception, progression, and consummation: The consummation is the death of the devisor; and that the consummation is chiefly to be regarded appears by the common case, that a man has power to devise lands to his wife, which he cannot grant to her;—and the reason is, because she is capable of taking at the consummation of the will. So if a man make his will, and afterwards become

will, and devised the estate; but the conveyances were not made, pursuant to the articles, till *November* following. Afterwards, and before any new will or publication made, the testator died: And the chancellor decreed, that inasmuch as the executors were by the articles bound to the testator's life—the testator

(a) This argument of *Raymond*, of which there is an imperfect sketch, *ante* p. 106. is now first published from a MSS. note of the case by Mr. Lutwyche.

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non compos, yet the will remains good: And he cited the case of *Manning and Andrews*, 1 *Leon.* 256. where there was a rent, which, at the time of the devise, was not in being.

There is the same reason why the *person* should be in being, at the time of the devise, as the *thing* devised; and yet such a devise is held good. A devise to an infant *in ventre sa mere* is good. 11 *H.* 6, 13. *Bro. (Devise)* 32. 7 *Co.* 9. Those cases must be intended upon the custom; but it is so likewise upon the statute. *Mo.* 77, 220, 637. 1 *Ro.* 234. 1 *Lev.* 135. *Snow v. Cutler.*

Dyer 158.

Where there wants a new devise to make the intent plain, there a republication of the will is necessary; but here, the intent sufficiently appears at the beginning; and therefore *Brett* and *Rigden's* case does not come up to this,—for that case is founded wholly upon the intent, that, at the making of the will, the deviser did not intend to pass any more lands, than what he had at the time of making the will. And as to the opinion of *Dyer*, mentioned in that case, (*fo.* 344. *b.*) where he says, the intent of the statute was, that the deviser should be seised of the lands devised, at the time of making the will, that opinion is not confirmed by the rest of the judges, nor taken notice of by them; and the reason my lord *Dyer* gives, is only from the words of the statute, which are, “every person HAVING, or which after the “act shall have, any lands, &c.” But those words are no more than the way of expressing, that all owners of lands should have a power of devising, &c. and do not of necessity imply, that they must have them at the time of the devise made. There is the same opinion set down again in *Butler and Baker's* case, (3 *Co.* 37.) by my lord *Coke*; and *that*, in all probability, was occasioned by the opinion of *Dyer*; but that point did not at all conduce to the determination of the principal case of *Butler and Baker*; for *there*, the deviser was not sole seised, and that was the reason of the judgment.

Afterwards, in *Mich.* term, 6 *Ann.* *HOLT* Ch. Just. delivered the resolution of the court as follows:

We have considered of this case all together, and we are all of opinion, that the will, as to these lands, is a void will, and that the lands do not pass thereby, but that judgment ought to be for the defendant, the heir at law.

We agree, that the words of the will are full and comprehensive enough to pass all these lands, had he been seised of them at the time of making this will; and we hold, they cannot by law pass on this account, only because the testator was not seised of these lands in the year 1692, at the time of making the will; tho' perhaps it might be his intention and design to have them pass.

The

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The case is no more than this: A man makes his will, and devises all his lands that he shall have at the time of his death; and after that he purchases lands, and * dies without republication, * P. 123. we hold that is a void devise; for a man cannot devise any lands, but what he hath at the time of making the will. *

*Vide Plowd.
342, 343, &c.
Brett v. Rigden.

And if it be of lands deviseable by custom, 'tis the same thing as of lands deviseable by the statute. A will, be it by custom or statute, is still a disposition of the estate and lands he then has; but no man can bequeath lands or estate he has not at that time; and tho' a will does not take effect to transfer the estate till the death of the testator, yet it is a will and disposition of his estate, even at the time of making such will; for from that time it is a will, and a disposition of what he devises away.

There is no act between the making of a will and the death of the testator, necessary to be done to make this a perfect and compleat will; no writing, no publishing, nor any other act whatsoever; it is subject indeed to a revocation, during the testator's life, and is to take effect only from the time of his death; but it is a will, and a disposition of the estate bequeathed, from the time of the making thereof.

Wheresoever there is a disability in the testator, at the time of making the will, tho' that disability be actually removed before his death, yet the will will still be a void will, because he had no ability at that time.

Suppose an infant makes a will, and devises land during his infancy; or a feme covert, in the life of her husband, makes a will and disposes of land thereby; tho' the coverture and infancy be afterwards removed, and the husband die, or the infant come of age; yet if either of the devisors die, without new making or publication of the will, this is a void will, because of the original disability; tho' they should live many years after such disabilities removed, yet the removing those disabilities will not do, without a new publication, or making a new will.

Now those are personal disabilities, but this is a real one: He had nothing in this case to give or dispose of; so here is a removal of a real disability; and shall the removal of that be more effectual to make it a good will, than removing a personal disability? No surely.

* It is said in *Force and Hembling's case* in 4 Co. 60. b. that the * P. 124. making of the will is not the will, but only the commencement of it: The meaning of that is only, that it does not transfer the interest and property of the thing devised; but still it is his disposition till he revokes it. Now what commencement has this will as to these lands? It cannot have a commencement from the time of making the will, because the testator had not the estate at that time. When then would you have this to be a will? Must you stay till he has purchased lands to make this a will?

Suppose

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Suppose he does, can a precedent devise extend to them? Now his act of purchasing those lands, and his act of disposing of them are two different things, and are of different natures. You must suppose that *eo instante* he purchases, he makes his will, tho' made long before, which is absurd and repugnant.

The law of *England* is plain as to this point, by all the precedents of wills; and the law is the same, both of lands devised by custom, as well as by statute. There is no will that I can find in any plea or entry, but it is said, that the testator was seised in fee of such and such lands, and that being so seised he made his will such a day, and did devise, dispose and bequeath so and so; which plainly shew it was absolutely necessary he should be seised in fee at the time that he makes his will; and of this there are multitudes of authorities. I shall name a few only, *Co. Ent.* 602, 664. And in *Roß.* 274. there is a precedent of a will of lands deviseable by custom, that the testator was seised in his demesne as of fee. 34 *H.* 6 6. *a.*

Tho' the forms of pleading do not make the law, yet constant pleading of a thing in such a manner is a great evidence of the law; and this argues the necessity of the testator's being seised in fee at the time of making the will. But it is objected, that lands deviseable by custom do differ from lands at common law, because that they are deviseable as goods and chattels; and appeal to the custom itself, set forth in the writ of *ex gravi querela*, in *F. N. B. b.* 199. *old edit.* Now it is said, that by this custom it is lawful to devise lands and * tenements as chattels, tho' the testator has not the possession of them at the time of making the will; and that a man may dispose of his chattels and personal estate, that he shall for the future acquire, any time after the making his will, to the time of his death; and shall therefore dispose of these customary lands in the same manner.

In answer to this, I desire the custom in that writ set forth may be well considered, and then it will appear plainly, that the custom is not general, that a man so qualified may devise *terras & tenementa*, as he may goods and chattels; but it is *tenementa sua*, they must be *sua* before he can dispose of them; they must be his property before he can devise them away. Now if they be not *sua* at the time of the devise, then he is out of the custom, and his will cannot be affected by it. It is true, personal estate and chattels may, by the common law, be disposed of before he has purchased, or had the possession of them; and there are many cases that make this out; but there is a great deal of difference between real and personal estate; for personal estate and chattels are transient and fleeting, and not at all fixt and permanent, as lands are. Perhaps the greatest part of a man's estate is in goods to day, and he may have a mind to turn those into money to morrow; now would it not be hard he should make a new will upon every alteration; for this the necessity of dealing

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dealing and traffick in the world, would require a man to make a will every day, if he could not dispose of his personal chattels, because they have undergone some alteration; this would be the greatest perplexity in the world. But on the other hand, lands continue the same every day, and will so to the end of the world. And as to real estates, there is time and opportunity to make settlements as he thinks fit; but of personal estate, that is under a constant variation, it is quite otherwise in reason.

Again, as to personal estate; the law has not appointed any person to succeed therein, where there is no will, as it has the heir in case of lands, but only now by act of parliament, there is an administrator to be appointed; * but at common law it was not so; and where the party testator appoints an executor, he takes under his right of disposition; when he is appointed executor, he takes all, as being named executor; and when the testator gives legacies out of it, it is in a manner a direction only to the executor how he shall administer; for legacies by the will do not pass to legatees in the same manner as a real estate; because, notwithstanding such devise, the property is in the executor, and not in the legatee, until the executor do consent to the legacy; but in a real estate the lands pass immediately to the devisee. This makes a great difference. The law has appointed a person in one case to succeed, where no will is, which is the heir; but in the other case at common law, no person is appointed to succeed to the possession of personal estate, but it is left to the testator's discretion. * P. 126.

Suppose the case was of a devise of a real chattel, and a man should devise a term of years, that he had not at the time of the devise, but purchased some time before his death; I doubt whether that would be good; though this be not the case, nor necessary I should give any opinion in it, yet I may make a great doubt of it.

Suppose for the purpose, one takes a college lease, and another makes his will, and should devise that lease away to another, and afterwards the testator should purchase that college land, subsequent to the making of his will, the question is, Whether this would be a good devise? And I am inclined to think, this would not be a good devise. There is the case of *Asby and Lever* in *Goldsb.* 93. comes up to this matter: A man makes his will, having a college lease, or other lease, and devises this lease to *J. Styles*, after the making of which will he surrenders this lease, and renews the lease from the said college, and then dies; the question was, Whether the devisee should have this lease? And it was held in that case, that the renewing the lease was a revocation of the will; and that the lease did not pass. This seems to be a very strong case, as to this point; and the reason

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* P. 127. * is plain, because the estate was not in *esse* at the time of making the will.

March 137. The question was there, Whether a term, not assented to by executors, and which passed only as an executory devise, could pass by the will of the devisee; and there it was held, it was only a possibility, and that nothing passed by the will. And indeed how could he dispose of a term that was not his, but another man's; it's hard to imagine such a preposterous thing; but I shall not give any positive opinion therein, this not being our case. The executor must assent to a legacy, else nothing passes; for nothing can pass immediately where a term is devised. But this is enough to shew a difference between a real and personal estate; one is permanent and lasting, the other mutable and fleeting.

To make a will to take effect from the purchase of the estate, is repugnant to the nature of a purchase; for the will gives it to another and his heirs, and the purchase gives it to himself and his heirs; the will gives it to his wife, and the purchase gives it to himself in fee; so that here is a perfect contradiction.

Now it is to be noted, here is no republication; for if there had been a republication, that would have done, and made those lands pass; provided that all the requisites and circumstances, necessary to the making of an original will, within the act of frauds and perjuries, had been observed.

Suppose a man devises all his land in tail, and afterwards purchases other lands, and dies before republication, those purchased lands will not pass; but if he republishes the will in such manner, and with such circumstances, as are necessary to the compleat execution of an original will, then the purchased lands will pass as by an original will.

Plowd. 340.
Es.

It is said indeed in *Brett and Rigden's case*, that where a man devises lands in certain, as the manor of *D. or White Acre*, and the devisor has nothing in the land at the time of making the devise, but does afterwards purchase the same, that such new purchased lands should pass * to the devisee, because his intent was manifest to pass it away; if that were law, it is full against me, but I think that case is not law; 'tis only a saying of Serjeant *Lovelace*, and the case quoted in the margin does not warrant any such thing. I thought indeed, before I looked narrowly into that case, which is 39 H. 6. 18. that it had been so, but there is nothing in that book to warrant it; nor is there any thing like it in either of the abridgments, either in *Fitzberbert sit. Devise* 17. a. or *Brook* (the same title) 15. It is only a note of two judges opinions. *Nota*, says the book, *In the King's Bench per Yelverton and Markham, If a man devises land, and is disseised after that, and then dies, the devise is void and cannot be made good; and the reason is, because the disseisin turns it to a right, and as then only a chose en action, and cannot be devised away; and therefore,*

* P. 128.

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therefore, says the book, it was held a good plea against this devise, that the devisor did not die seised of the said land. But the book goes on further, and says, Suppose a man is disseised, and then makes his will, and devises lands, and afterwards re-enters into those lands, it is made a question there if it be a good plea to say, that the devisor had nothing in the lands at the time of the devise. This is the case put, and the case meant, which is the ground of the preceding opinion; and it seems by that book, that if he does re-enter, the lands shall pass. And I am of opinion, the lands will pass if he re-enter; and the reason is, when a man is disseised, and he makes a re-entry, that such entry purges the disseisin, and the disseisee, by relation to all intents and purposes, is in possession from the beginning; and for that reason, he shall have an action for the mean profits, between the time of the disseisin and bringing the action; and so is 38 H. 6. 27. 19 H. 6. 17. He may in such case be justly said to be seised in fee of such lands, and therefore may dispose of and devise the same away; because the entry reverts the estate, and he is now, in consideration of law, in possession from the time of the disseisin, and therefore is entitled to the mean profits, as tho' he had been actually in possession all the while; but that is not this case, * for here the devisor has neither *jus in re*, nor *jus ad rem*; for the land is here purchased * P. 129. eight years after the making of the will.

Suppose an heir, that has nothing but a bare right, should, during his father's life-time, make a will, and devise all his lands that he should have at the time of his death; would the land, that came to him by descent from his father, pass by the devise? No surely.

But then, Suppose a man makes a will of lands in reversion, expectant on an estate-tail, or estate for life, and before his death the tenant for life, or in tail, dies, without issue, these lands will pass, tho' a reversion only at the time of making the will; because he is seised at that time as much as he can be; and it is a certain present interest, tho' to commence *in futuro*; and all the estate that he could give, he intended him.

There was a case in my Lord Bridgman's time of *Davis* and *Kemp*; it was a devise of lands to two persons, and their heirs, and one of them dies, during the life of the testator; and the question was, Whether the survivor should take the whole or not? And it was held he should; which plainly shews 'twas a will and disposition from the time of making it. See 1 Chan. Cases 191.

Supposing *A.* has a manor, and makes his will, and devises this manor, and before the death of the testator, a tenancy escheats to the lord, and after that the testator dies; the question is, Whether the escheated tenancy shall pass? And I hold, that the tenancy, that escheated between the making of the will and the death of the testator, shall pass; because the manor is devised, and that is part of it; for the tenancy is not devised as

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a distinct thing, but as a part of that whole which he could devise.

I look on it to be very plain, and to be my Lord *Coke's* opinion in *Butler and Baker's* case, in the 3d report, that a devise is a disposition; and that case was so adjudged in the Exchequer Chamber by all the judges in *England*, and that a custom to devise ought to be construed the same as on the statute.

* P. 130. * Therefore for these reasons I hold, that judgment ought to be given for the defendant; viz.

1. In regard it is a will at the time of the making.
2. Inasmuch as the testator has not power to give what he had not.
3. The constant manner of pleading shews the necessity of the testator being seised at the time of the devise.
4. A devise of lands is not comparable to a devise of personal estate; because a personal estate is altering every day.
5. Because a devise is repugnant to the nature of a purchase: A purchase is to the devisor and his heirs, and the devise is to another, and his heirs.
6. Because there is no case, nor authority in law, to warrant any contrary judgment.

This judgment was afterwards affirmed on error in the House of Lords. *Vide Browne's Parl. Cases*, 1 V. 199. And note; That at this time there was another case depending on the same will, but for other lands, in *C. B.* and the same points were there debated and afterwards adjudged; which see hereafter reported in *Mich. term 6 Annæ*, N. 12. *Archer versus Bokenham*.

Keeble against Hickerlingill.

The judgment of the court, delivered by *Holt* ch. j.
Case for disturbing his decoy.
Ante 73.
3 Salk. 9.
Holt 14, &c.
S. C.

1. A decoy in nature of a trade.

* P. 131.

(10.) **T**HE declaration is, That the plaintiff was lawfully possessed of a close of land, and a decoy therein; and that the defendant knowing it, and intending to deprive him of the benefit thereof, and to hinder the ducks from coming to the decoy, did, on divers times, shoot off and discharge guns, &c. maliciously. And a verdict is for the plaintiff.

1. This decoy is a benefit to the plaintiff, and in nature of a trade; and there is the same reason he should be repaired in damages for his decoy, as for any other trade. 'Tis true, there may be a *dampnum sine injuria*, 11 H. 4. 44. If a man set up the same trade as mine, in the same town, this is a damage to me, but * it is *sine injuria*; for 'tis lawful for him to set up the same trade if he pleases, 23 or 19 E. 3. fo. 18. But this action is brought for disturbing the wild ducks coming to his decoy; and so is in nature of disturbing him from exercising of his trade; and therefore he

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he need not set forth how many ducks, which was the exception taken at the bar. See 2 Cro. 126, 123. Owen 109. Also this is not like the case in 5 Co. which was *pisces suos cepit*, and did not say how many, nor of what nature. For in this case 'twas impossible to say how many, because the action is brought for disturbing them coming only to his decoy.

2. The stat. 25 H. 8. c. 17. does enumerate what is wild-fowl; so that the law takes notice of wild-fowl, and shews what it is; and we must take notice of it too, or else how can we obey this law?

2. The law takes notice of wild-fowl.

3. There is a difference between this case and that of franchises. For if I have a fair, market, ferry or the like, granted to me, no man else shall use another to my damage; for these are of a publick nature, and divers persons besides the grantee have an interest in them; and if I do not repair my ferry, &c. I am indictable; and therefore no man shall erect and use another ferry, &c. to my damage. But any man may freely use a private franchise, as a park, warren, way, &c.

3. A difference inter publick and private franchises.

4. This case is not like that in 5th Coke, about taking fish out of a pond, &c. For in that it was trespass, to have damage for the thing taken; and therefore it was necessary to set out how many, and of what nature. But this action is a trespass on the case, to have a recompence for a consequential damage or injury; and is for hindering me from exercising my private right: For those ducks might have come to my decoy, to my benefit, which were here hindered, to my damage, &c. And according to this, he cited a case in one of the year-books, where an action was brought by the owner of a market, for hindering horses being brought to the market, and adjudged that it well lay, tho' it did not appear certain that any body would have brought them. And so where a person is hindered from going to a fair, market, &c. for it is injurious, to hinder a man from going where he has a right to go. (Quære, If not so where one is hindered from doing what he has a right to do, tho' no special damage.)

4. And inter this case and that 5 Co.

2 Saund. 172.

* P. 132.

Anonymous.

(11.) SIR Edward Northey moved for an information against a man, chosen of the common council of Bristol, who refused to accept the office, and supposed, That in case they might refuse to accept it, the corporation would soon be at an end. He also said, That the sheriffs were always chosen out of the common council: And that the court would take notice of a common-council man as of a publick officer, and that a corporation is a part of the publick government.

An officer chosen in a corporation refuses, &c. 5 Mod. 440. Post 142.

D d

But

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But *per Holt Ch. J.* That is *quoad* the place where they have a power as a corporation to make by-laws; and they should make a law to inflict a penalty on him that refuses, and this is the proper way. *Sed adjournatur.*

Anonymous.

No prohibition to inferior courts, where they have jurisdiction.
Ante 69.
1 Salk. 201.
Holt 186.
2 Mod. 271.
&c.

(12.) **NOTE**; *Holt Ch. J.* and all the court agreed unanimously, That if an inferior court has jurisdiction over the cause of action, no prohibition ought to go, upon a suggestion, that the cause of action arose out of the jurisdiction; but you ought to plead to the jurisdiction, and if they refuse such plea, then move for a prohibition. And *Holt* said, There have been cases to the contrary, but the law is now settled otherwise; and if a person pleads in chief, he shall never assign this for error, if such inferior court have jurisdiction of the thing.

* P. 133.

* *Rich against Wilks.*

Covenant; and breach assigned after the declaration.
1 Sid. 307.

(13.) **A** Covenant was, That the defendant should dance, sing and act under the society of comedians, and obey orders; and should act and be assisting to no other theatre, but what was appointed by Mr. *Rich*: And the breach assigned was, That he acted at *Oxford*, without the consent of the plaintiff. The defendant demurs to the declaration; and

1st Exception.

Pengelly for the defendant excepted to the declaration. 1. That it is set out with *posthæc*, &c. which must be construed from the filing of the declaration, (or bringing the writ) and it should have been *post confectiorem indenturæ*, i. e. That he the said *Robert Wilks* did covenant that he, for five years after the making, would not act, &c.

2d Exception.

2. This breach is not well assigned; because it does not appear, that the play he acted was publick, and if not so, it was no damage to the plaintiff. And the design of the covenant was not to restrain any dancing, acting, &c. unless where it drew others to lay out their money at other play-houses, from the play-house of *Rich*.

Salkeld contra. This breach is assigned according to the covenant, and 'tis not material whether the acting were for gain or not. But take it to be for no gain, 'tis yet prejudicial to the plaintiff; for no body will see his play, when they can see another for nothing.

Holt and Powell. That *quod posthæc non ageret*, &c. in the declaration should have been *quod abinde non ageret*, &c. Now *posthæc* was right in recital of the covenant, but wrong in the declaration;

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claration; because *posthæc* must be taken to be after the present time; so that the breach is laid to be after the declaration. But it was adjourned; tho' the court thought it could not be made good.

* Love *against* Dr. Bentley.

* P. 134.

(14.) **T**HE Solicitor General moved for a *mandamus* to the parish of St. Clement's in Cambridge, to let the defendant have the sight of the parish-books. It was in action brought for a false return to a *mandamus*, for Dr. Bentley to swear the plaintiff a church-warden.

Parishioners have right to view parish books.
Ante 111.
Comb. 102.
2 Barnard
K. B. 235.
2 Str. 948.

Eyre contra. This is not like the case of a corporation which is of a publick nature, and cited a case to that purpose.

Holt Ch. J. They ought to have a sight of the books; and this case is not like the case cited by Mr. *Eyre*, which concerned the title of an estate; and yet, in the case of a copyhold, every copyholder has an interest in the rolls; so here, every parishioner has a right to the parish-books. And the court ordered copies of the books to be given, which *Powell* said would be good evidence, (*i. e.*) against the plaintiff, but not for him, as I apprehend; because in this case he has the custody of the books themselves, and may produce them in evidence, if he pleases.

Squire *against* Yendon.

(15.) **I**N case, the plaintiff declares, that the defendant being indebted to the plaintiff in 10*l.* for horse-meat, in consideration thereof, promised to pay to the plaintiff as much as he should deserve. And after verdict for the plaintiff, *Fortescue* (*John*) moved in arrest of judgment; and excepted, That a sum certain could not be a consideration for an uncertainty. Suppose the jury had given 11*l.* 10*s.* that could never be a good consideration for more.

A sum certain a good consideration for an uncertainty.
Style 320.
1 Roll. 28.

But *per cur'*. 'Tis well enough, and the plaintiff has election to bring his action upon either.

* Savage *against* Walthew.

* P. 135.

(16.) **I**N an action on the case by a carrier against his servant for losing goods, &c. Exception was taken, That this action lies not, except it appear that the carrier had received damage by being sued. For this action lies only in respect of the damage the master sustained. See *Cro. El.* 53, 461. *Cro. Car.* 187. *contra.* 'Twas further objected, That if this action lies, the defendant

Case by a carrier against his servant lies not. 2.
1 Salk. 282.

Trinity Term 6 Ann.

defendant might be twice charged, *i.e.* by the master and by the owner.

Yelv. 44.
2 Saund. 47.

Holt Ch. J. Not so, unless there be an actual conversion; for the owner of the goods has an action against the servant only in case of a conversion. And the master has a special property in the goods, and may maintain trover; and the master is liable to the owner, by reason he was intrusted by him. Besides, there ought to be a negligence shewn in the servant, to make him liable to this action, for this amounts only to a bailment of goods, where, if thieves break in and steal them, he shall not answer it. And judgment *nisi* within three days.

Modely and his Wife Executors *versus* York.

Executor to
pay costs,
where money
received after
testator's
death.
Ld. Raym.
436.
Str. 682.
6 Mod. 181.
Barnes' 4to
ed. 132.

(17.) **I**N an *assumpsit* by an executor, for money received after the death of the testator, if the executor be nonsuit he shall pay costs. For the law gave this privilege to executors, of not paying costs, only where the cause of action accrued in the testator's life-time; and there, because it could not be supposed that the executor was consulant, or privy to the acts of the testator.

* P. 136.

* Mich. Term, 1707.

6 Annæ Reginae in B. R.

Queen *against* Simmons.

Order of ba-
stardy.
Ante 59.
2 Ld. Raym.
1157, 1198.
6 Mod. 180.
1 Salk. 122.
Holt 107.

(1.) **M**OTION to discharge a person committed, by the justices at their sessions, on the 18 Eliz. c. 3. The statute says, *That the two justices, if they order a person to keep a bastard-child, may commit him, unless he gives security.* 2 Bull. 341. And 'twas objected, that the justices, and not the sessions, have the power in this case to commit, &c.

Powell.

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Powell. Suppose he gives security to abide the order of two justices, and that this order is confirmed at the sessions, cannot they commit him for disobeying it?

Holt Ch. J. No, they cannot; they must proceed upon the security. *Answer.* But here is no security given. In this case the man kept out of the way, so the two justices could neither commit him, nor take security of him; but they make this order upon him, and then he appeals to the sessions, and the justices there order him to be committed. The order was quashed; but the court bound him over to appear at the next *quarter-sessions*.

Falmouth against Strobe.

(2.) **I**N ejectment the case was this: The assises began on the *Monday*, and the defendant died the day before, and yet a trial was had, and a long defence, and a verdict for the plaintiff; and now 'twas moved, that * judgment should be arrested. 'Twas objected, That this is matter of fact, and not assignable after verdict, but that they ought to bring a writ of error.

Holt Ch. J. If he had died the day the assises began, tho' the cause had been tried after, the trial had been good, tho' he had died at one o'clock in the morning; for there is no fraction of a day, according to *Shelley's case* in 1 *Co.* In which case my Lord *Hobart* said, any man, as an *amicus curiae*, may inform the court of such an error. *Adjournatur.*

Discontinu-
ance by
death.
1 Salk. 8.
S. C.
2 Ld. Raym.
1415.
* P. 137.

Queen against Woodward, &c.

(3.) **I**NDICTMENT against several, for intending to defraud *A.* of his money; and that they threatened to send him to *Newgate* by colour of a warrant, and to indict him of perjury, unless he would give them money and a note; which he did through their threats.

Darnel urged, That this was no offence indictable, but 'twas over-ruled. Then he took exceptions to the indictment. 1. That 'tis not averred, he had no warrant to carry him to *Newgate*. 2. Neither is it averred, That he is not guilty of perjury. 2 *Roll Rep.* 263. 3. That 'tis not averred, That any money was actually paid. *Sed cur' contra.*

Holt Ch. J. Every extortion is an actual trespass, and an action of trespass will lie against a man for frightening another out of his money. If a man will make use of a process of law to terrify another out of his money, 'tis such a trespass as an indictment will lie for.

Judgment for the Queen.

E c

Anonymous.

Indictment of
extortion.
Ante 80.
1 Salk. 382.

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Anonymous.

Mandamus to grant administration.

5 Mod. 374.

Holt 656.

1 Str. 552.

* P. 138.

(4.) **S**IR Edward Northey moved for a *mandamus* to the surrogate of the bishop to grant administration to B. The case was, that administration had been * committed to one who died, and made an executor, who would have had it committed to him, and not to the next of kin to the intestate.

Holt Ch. Just. It cannot be, but it must be committed to the next of kin to the intestate. And granted a *mandamus* for that purpose.

Ludlow versus Browning.

Testator's estate not liable to a commission of bankruptcy against the executrix.
Holt 104.
S. C.

(5.) **T**HOMAS Walker made his will, and his wife executrix thereof; she married a bankrupt. Browning the defendant was indebted to Walker by bond, and the debt becoming due, the commissioners assigned that debt, and 'twas urged, that this debt is not assignable by the commissioners of bankruptcy; for 'tis a debt due *in auter droit*, and not to the executrix in her own right, &c. and that 'tis not forfeitable by her or her husband. 10 E. 4. 1. Kelway 64. b. Cro. Car. 464. 1 Jon. 386. Cro. Car. 208, 218. 1 Lev. 17. Raym. 67, &c.

Kelway 64.
2 Roll. Abr. 58.

Parker Serj. The question is, Whether the commissioners can assign a debt due to the bankrupt's wife, as executrix to another? I agree 'tis not forfeitable by outlawry, &c. of the wife or husband. But a thing may be grantable or assignable tho' not forfeitable; his grant can convey away the goods, tho' he cannot forfeit them. The statute enables him to grant or assign *choses in action*. Whatever the man himself can grant, the commissioners may. If a man grants *omnia bona & catalla sua*, a term in right of his wife will pass.

Holt Ch. J. This here is a *chose in action*, and *in auter droit*, and asked if he had any more to say. Respons. 2 Cro. 318. And as to this being a *chose in action*, there is no difference: For they have the same power over those, as over goods, &c. Noy 142. Palm. 505.

Whitacre. There are no words in the statute that impower the commissioners to assign the estate of another man, but of the bankrupt only.

* P. 139.

* Holt. This, in truth, is the estate of the testator, and they have no authority to assign any thing whatever but the bankrupt's estate; the power the husband has of disposing of it, does not make it his, till he has disposed of it.

Powe!!

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Powell Just. Brother *Parker*, you have a hard case to maintain; the old books do indeed say, If a man grants *omnia bona sua*, such things in action shall pass, because the property must be in somebody; but the law has been ruled otherwise since; and therefore, if he has any other goods, the statute is satisfied; and by his grant of *omnia bona sua*, none but what are really his own shall pass; and these words shall not pass away those things which would make him a wrong-doer, and in this case commit a *devastavit*. See *Knight* and *Gould's* case in *Levinz*. You would have the commissioners be the testator's executors, but they are only to pay the debts of the bankrupt, but not the debts of the testator. *Adjournatur*.

Tully *versus* The Bail of Vavasor.

(6.) **M**R. *Raymond* moved to amend a *scire facias* against bail, upon a writ of error brought on a judgment in the Common Pleas, where the clerk who had the judgment before him, in which the plaintiff's name was *James*, and the clerk had made it *Randal*, which was a variance from the record; for the judgment recorded was misrecited in the writ. *Scire facias*
amended.
1 Salk. 52.
S. C.

Mr. Eyres. There was a judgment recovered against *Vavasor*, and that judgment was affirmed here with costs, *pro dilacione executionis*; and the only thing they can amend by, must be the writ of error.

Holt Ch. Just. cited a case, where a man can bring a writ of error on a judgment given for himself. 2 *Ventr.* 104, 105.

Raymond. 'Tis only *vitium clerici*, and a meer mistake in him, in not pursuing his instructions; and such mistakes may be amended after a writ of error.

* *Holt*. If it be amendable at one time, 'tis so at another; if it may be amended before a writ of error, it may be amended after a writ of error brought. * P. 140.

Powell Just. A man can never bring a writ of error to reverse a judgment that is given for him; for there must be a damage, a *gravamen* recited, which cannot be of a judgment that is given for him. *Quære de hoc?* But on the whole, the court held, that the writ of *scire facias* in this case was amendable.

Note; The mistake in the *scire facias* was, the clerk had made it reciting, *That whereas Randal had recovered against James*; whereas the judgment was, *That James had recovered against Randal*.

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Queen *versus* Hurst.

Ale-houses.
Indictment
quashed
1 Salk. 45.

(7.) **A**N indictment was for keeping an ale-house without a licence. Mr. *Edward Winninton* moved to quash it, because the statutes of *Ed. 6.* and *3 Car. 2.* have carved out particular penalties.

And by the whole court it was quashed accordingly.

Clerk *versus* Price, (a Parson.)

Vide Hil. 7
Annæ, N. 7.
p. 208.
2 Salk. 692.

(8.) **P**ROHIBITION moved for to the Spiritual Court for words, which in the libel were laid to be, That the said *Price* behaved himself proudly and insolently; and that he was an impudent ignorant blockhead; and that he also said and declared, that the advice and exhortations, and other spiritual directions of him the said *Price* from the pulpit, are not fit to be taken; and that he was not fit to give the sacrament. And that the said Clerk, speaking to a third, said, you would not receive the sacrament from such a puppy as the said *Price* was, was you to live never so long in his parish.

Serjeant Parker (now *Sir Thomas*) to shew cause why a prohibition should not go, said, These were not words of heat, but of deliberation, and highly touched him in his function; and cited the case of *Cranden and Walden*, 3 *Lev. 17.*

But *Holt Ch. Just.* said, to which the court did not disagree, That tho' these words did reflect on him in his profession, yet seeing they do not charge him with any thing for which he is obnoxious to the Spiritual Court, therefore a prohibition was granted; and 'twas ordered to come before this court, by declaration and demurrer.

The Queen *versus* Mayor of Thetford.

Affidavit in
a different
motion cannot
be read.
2 *Ld. Raym.*
848. 1 *Salk.* 192. 3 *Salk.* 103. 6 *Mod.* 25. *Holt* 171. *S. C.*

(9.) **T**WAS resolved in this case, that in a motion for an information against *A.* an affidavit in a motion against *B.* cannot be read; because the swearer cannot be prosecuted for it, if false.

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Davis *versus* Daverill.

(10.) **I**N a motion for a new trial, on suggestion, that the defendant did arrest and imprison one of the plaintiff's witnesses till the trial was over; adjudged to be good cause of granting a new trial.

New trial.
5 New Abr.
249.

The Queen *versus* Bonnet.

(11.) **M**R. Eyres moved to quash an order made by two justices of the peace; because the order was said, to be made *coram custodibus pacis nec non justiciariis*, &c. and all justices of the peace are keepers of the peace; but all keepers of the peace are not justices: And he further argued, that they have not been called *conservatores pacis* only since the stat. 34 Ed. 3. cap. 1. But the court over-ruled his exceptions, and adjudged the order good.

Conservatores pacis a good name for justices of the peace.
Lamb. Eiren.
11, &c.

* The Queen *versus* Hungerford.

* P. 142.

(12.) **A** MOTION was made for an information, in nature of a *quo warranto*, against a common-council man of Bristol, for refusing to take upon himself the office, after he was chosen. But the court denied the motion; and said the remedy was to proceed by their by-laws, in order to compel him; he not being such a public officer as a sheriff, &c. But if they had applied to the court for a *mandamus*, they should have had it.

Information for refusing to act as common-council man, denied.
Ante 132.
5 Mod. 440.

The Queen *versus* Rudd.

(13.) **P**ER cur'. A crime that shakes religion, as profaneness on the stage, &c. is indictable; but for writing an obscene book, as that intitled, *The fifteen Plagues of a Maidenhead*, is not indictable, but punishable only in the Spiritual Court.

Writing an obscene book not indictable.
4 Black.
Com. 41, &c.
Str. 788.

Etherington *versus* Reynolds.

(14.) **A**N *indebitatus assumpsit* and *in simul computasset* was brought against the defendant Reynolds. They plead in abatement, that she was a feme covert; the plaintiff replies, that he entered a plaint against her when sole, in the Palace Court.

Removal of records, &c.
1 Salk. 8.
Fortesc. 269.
S. C.

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Court, which she removed into *B. R.* by *babeas corpus cum causâ*, and put in bail as a feme sole; and the plaintiff delivered her a declaration agreeably to the plaint below; to which replication the defendant demurred.

Pengelly for the defendant. That she having removed herself up by *babeas corpus*, and having put in bail to answer a declaration here, nothing of the proceeding below is removed; as in case of a *certiorari* or *recordari*, in *Sur's* and *Turner's* case, *Hil.*

* P. 143. 3 *Annæ Reginae*; and the * plaintiff ought to have declared against her, as she was at the time of the declaration delivered, and not as a feme sole, according to the plaint below.

Holt Ch. Just. If an *indebitatus assumpsit* be brought in an inferior court, and the defendant removes it by *babeas corpus*, and to the declaration above pleads *non assumpsit infra sex annos*; the plaintiff may reply, that a plaint was levied in an inferior court within six years; but to this the plaintiff cannot reply, that the defendant was sole when the plaint was levied below.

Judgment.

The court was inclined to give judgment for the defendant; but, as an indulgence for the equity of the cause, 'twas adjourned to *Hilary* term next.

Lawn and Sawbridge.

Errors confessed by pleading in *nullo est erratum*.
1 Salk. 270.

(15.) **I**N a writ of error out of *C. B.* the defendant pleads in *nullo est erratum*; 'twas in a *scire facias* against bail, and the plaintiff assigned for error the want of a *scire facias* on the roll.

Lutwych for the plaintiff said, that the defendant's plea confessed the error assigned.

Eyre for the defendant argued, that 'tis not like the case where you proceed on an original, and the want of an original is assigned for error; for then the record may be removed without the original; but in this case, nothing can be removed but the *scire facias* itself, and so 'tis repugnant to say there is no *scire facias*.

Resolved by *Holt Ch. Just.* That this error might be assigned, as well as the want of an original bill; and that by pleading in *nullo est erratum*, the plaintiff has confessed the error: But the whole court, viz. *Holt Ch. Just. Powell, Powis* and *Gould* agreed, that a *certiorari ad informandum conscientiam curiæ* might be awarded.

Which was done accordingly.

* Hil.

* Hil. Term, 1707.

* P. 144.

6 Annæ Reginae in B. R.

Alton *versus* Jarvis.

(1.) **T**RESPASS for entering his close, and taking cattle; the defendant justifies by several judgments in a court-baron, where the plaintiff levied a plaint against the defendant; whereupon judgment was for the defendant, and costs given him; and thereupon the defendant, by virtue of a *levari facias*, took the cattle and sold them; and for this the plaintiff brings his action. And the defendant demurs to the declaration.

Gillb. Law of
Distress and
Replev. 20.
ed. 1780.

Raymond for the plaintiff insisted, that they could not sell the cattle upon a *levari* in a court-baron, without alledging a custom for so doing; and cited *Bro. Abr. Execution* 80. *Lutw.* 1524. *Dalt. Sher.* 419. *Lutw.* 1410. *Kel.* 106. The bailiff ought to keep the distress till the parties agree.

Lutwych e contra. If the bailiff cannot sell, 'tis to no purpose to take execution; but the words of the writ are, *quod levari facias*, so that he have the money at the next court, which cannot be, unless he may sell; and he cited *Bro. tit. Execution* 26. 2 *Lev.* 81. 3 *Keb.* 126. 8 *Co.* 41.

Raymond replied, That *Bro. Execution* 26. is no judgment, but only an inference; and is precedent in time to *Bro. Execution* 80.

2.

Holt Ch. Just. Distraining is levying. (2.) If a man distrains for rent, and impounds the distress, and then brings debt * for the same rent, the defendant may plead *levied by distress*. As to the selling by the *levari*; 'tis always alledged in pleading to be *secundum consuetudinem manerii*, which is the custom in most manors, being so general, that any court-baron, &c. may plead it as a custom. *Adjornatur.*

Ante 23.

* P. 145.

Arch-

Hilary Term 6 Ann.

Archbishop of Canterbury *versus* Willet.

A bad replication may destroy the cause of action.

1 Salk. 172,
251, 315.
S. C.
Lutw. 882.

Administrator bound to account without citation.

(2.) **D**EBT upon an administration-bond of 3000*l.* and on oyer of the condition it was to cause a true inventory to be made, and to exhibit it into court, and well and truly to administer, and to render an account, and to deliver the rest as the court should adjudge. The defendant pleads, that he had exhibited an inventory, duly administered, and that he never was cited to account, nor was there any adjudication that he should dispose of the rest; and the question was, Whether an administrator is bound to render an account, tho' he never was cited? And judgment was, that he is bound to put in an account before the last day in the condition, at his peril.

Holt Ch. Just. That an executor is bound to account. See 21 E. 3. 9 Co. *Henley's case*. If an executor had been summoned by a creditor, and made his account, the ordinary could not hold plea of it; because the ordinary cannot relieve. 2 Inst. 600. *Noy 78*. But he must take the account, as the executor has made it upon oath: But if a legatee comes, he may unravel the account, because 'tis the only court for him to sue in; and therefore he is not bound by that account. But if the executor will pay him his legacy, then he cannot compel him to exhibit an inventory or to account; because he has the end of his suit.

Raym. 407. *Raym. 407*. The stat. 22 Car. 2. of distributions, makes the next of kin as legatees. And before the making of this statute, Co. Ent. 128. is, that the administrator should account when he was thereto required. He is now bound to do this at his peril,

* P. 146. * unless he can shew some cause to the contrary: And here he ought to have shewn some reason why he did not. Whenever a man is bound in a bond to do an act that is possible, especially if 'tis to be done at a certain time, or place, he is bound to do it at his peril. *Hob. 132*. So it is in a mortgage; and when

2. Hob. 8. a man is bound in a bond to do an act that cannot be done, as to give an account at a court such a day, &c. he ought to plead, That there was no court held that day, &c. and that he was ready at the place, and had done all that he could. See

13 E. 3. 13. 14 E. 3. 17. 17 & 18 E. 3. 70. *Holt* took to be a very good case, 8 Co. 120, 130. which cases were cited to shew, that if the plaintiff makes a bad replication, he may destroy his cause of action; and that so the case seemed to be here. And therefore ordered it to be spoken to again next term, *quoad* this matter.

But the court were clear, that the bar was naught; and that he was bound to account, without citation, at his peril. And

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by *Powell* Just. He has here confessed a breach, because he says, He was never cited, and so it may be good, *quoad* the defendant's confession, tho' the plaintiff has not shewn any breach. *Adjournatur*.

Asher versus Wallis.

(3.) **A** Man having a wife in *England* goes to *Jamaica*, and there marries a rich woman, and lets her lands, re-serving rent to himself, and received the same divers years. But after some time, they both coming into *England*, she perceived he had another wife living; and thereupon brings an *indebitatus assumpsit* against him for the said rents, as so much money received by him to her use. And at the trial at the Guild-hall *London*, this point was saved to be argued by counsel, Whether an *indebitatus assumpsit* would lie in this case? Which was argued this term.

Indeb' assump.
A. having a former wife living, marries another, who has lands, &c. which he lets, and receives the rents, &c. the 2d wife brings her action and recovers.
Holt 36. S.C.
And see 2 Burr. 1008.
* P. 147.

Dee the common Serjeant said, 'Twas like the case of a disseisee, who could not maintain an *indebitatus assumpsit* * against the disseisor, as for money received to his use; and in this case there was another and a proper action; For if the rents were received with her consent, she might have an action of account against him as receiver; if without her assent, trespass lies.

Eyre also for the defendant said, That an *indeb' assump'* will not lie, but where money is due on some contract; therefore when one man enters on another, and sells his goods, &c. he who has the property in them cannot have an *indebitatus assumpsit* for the money received, as for money received to his use; but must have his action as for a wrong done, viz. trespass, assize, &c.

Whitacre for the plaintiff, That the action lies; for the plaintiff was consenting, and often present when the money was paid. That where debt will lie, an *indebitatus assumpsit* will also lie in many cases, so not confined to a particular action. But here it cannot be said, That the defendant was a wrong-doer, because it was done with her consent: Besides, an *indebitatus assumpsit* will lie, though there was no contract; as for the profits of an office wrongfully received, tho' received by one who pretended a title. See 9 Co. The case of the city of *London*.

2. Cro. Eliz. 82, 83.

Darnel also for the plaintiff, That there is no need of a contract to maintain an *indebitatus assumpsit*; for where money is overpaid, this action will lie for the surplus. If the wife lends her husband's money to J. S. the husband may have either *indeb' assump'* or trover. Q. If rents are received by false tokens, either account or *indebitatus assumpsit* lies.

3 Mod. 260.

And by the whole court 'twas agreed, That an *indeb' assump'* would well lie. But *Holt* Ch. J. said, That trover would not lie

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in this case, because she was never possessed of the money; and when she married the defendant, she consented, that he should manage her estate. He cited a case in 1 Co. where if money be over-paid, either debt or *indeb' assump'* lies. If two lay a wager, and stake down the money, the winner shall have an *indeb' assump'* against him that holds the stakes, as for money received to his use. And judgment for the plaintiff.

* P. 148.

* Archer *versus* Bokenham, in C. B.

Lands purchased after a will made, pass not by it. Ante 106, 121. On the same will but not for the same lands. Fitzg. 233. Holt 750. S. C.

(4.) **EJECTMENT** was brought for a house in *Kent* by *John Archer*, on the demise of *Robert Bokenham*, against *Frances Bokenham* widow; and on not guilty pleaded, there is a special verdict, wherein the jury find, That as to a moiety of the said house the defendant is not guilty; and as to the other moiety they find, That *William Bokenham* Esq; late the husband of the defendant, being commander of their late Majesty's ship the *Grafton*, on the 3d of May, 1692, duly made his last will and testament in writing, which they find *in hæc verba*: It recites, that he was then bound out to sea, and then says, *I do hereby give, devise and bequeath unto my well-beloved wife, Frances Bokenham, all such sum and sums of money as now is, or hereafter shall grow due to me from their Majesties for my own and servant's service, either by sea or land: As also all such sum and sums of money, lands, tenements, goods, chattels and estate whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me: And I do hereby nominate and appoint her the said Frances Bokenham, my well-beloved wife, to be the whole and sole executrix of this my last will and testament.*

They further find, That the testator, at the time of the making of the will, was not seised of any lands whatsoever; but that afterwards by deeds of lease and release, bearing date 26th and 27th days of February, 1693, Sir *John Franklin* and *Thomas Halsby*, being seised in fee of the other moiety of the said house, conveyed the same to the said *William Bokenham* and his heirs, whereby he became seised, and so died without issue of his body.

They find, that the house aforesaid is held in socage, and is of the nature of gavelkind, and devisable by the custom of *Kent*; and to be divided amongst the heirs male, by hereditary right.

* P. 149.

* They further find, That the testator had two brothers, *Robert*, lessor of the plaintiff, and *Harry Bokenham*, who was then dead, and had left issue of his body *Anne* an infant; and that *Robert* and *Anne* were heirs at law to the testator.

That *Robert Bokenham* entered into the said moiety, and demised to the plaintiff, upon whom the defendant the devisee entered; But whether the defendant be culpable, they desired the opinion of the court.

The

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The question is, whether these lands (that is the moiety named in the special verdict) did well pass by the will to the defendant *Frances Bokenham*, or not; for if they do not pass, then this moiety belongs to the lessor of the plaintiff.

Ld. ch. j. *Tre-*
vor deliver-
ing the opi-
nion of the
whole court.

And we are unanimous of opinion, that those lands do not pass to the defendant by this will.

This question, touching the validity of this will, doth depend on the consideration of two matters.

1. On the consideration of the statute of wills (32 H. 8.) which was made to enable persons to devise lands by their last wills.

2. On the consideration of the custom of gavelkind, which is particularly found in this special verdict.

In the first I will consider, whether the statute doth enable any one to devise lands he is not owner of, nor has any interest in, at the time when the will was made, but does purchase lands in his life-time after the making such will.

This depends on the construction of that act, which says, *That all and every person and persons having manors, messuages, lands or tenements, shall have full and free liberty to dispose and devise the same by his last will and testament.* Whether the word, *having*, doth make it necessary that the testator should have the possession of, and interest in, the lands, at the time of making his will? Or, Whether it be sufficient if he have or purchase the * lands at any * P. 150. time after the making his will, and before his death?

Now in order to come at the meaning of this statute, I will suppose this act lately made, and that there had been no construction made thereof before, but that the question was entirely new and undetermined, and that it was now *res integra*; What would then be a reasonable construction of those words of the act?

And in the next place, I will consider what construction this act ought to receive, as it has been already expounded and determined, and from the consequence of such determination.

Now as to what would be a reasonable construction, supposing it were to be made *de novo*, and to be now originally expounded.

I am of opinion, it would be a very reasonable construction, that this act should not extend to enable any person to devise any lands he has not, nor is owner of, at the time of making his will, unless he republish it; which is the same in substance as new making it?

The general rule in exposition of all acts of parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare;

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clare; therefore in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had had that design, they would have expressed it in the act.

Now how will the common law influence this matter before us?

First, It is plain by the rules of the common law, that is, such rules as are to govern conveyances and dispositions of estates; the law did never allow any person, by any conveyance at common law, to dispose of the lands he had not, or had no right or interest in, at the time of making and executing such conveyance.

* P. 151. * And so is 1 *Inst.* 265. It is there said, and was never yet denied, *If one release all the right he has, and all the right which he should or could have for the future*, though in express words which sufficiently shew the intent of the party, yet such release is void, &c. And this was never contradicted by any one.

However there are some exceptions to this rule as to releases of future rights; that is, that in some cases a man may release a future right, tho' by the bare release it can never pass; as 1 *Inst.* which I mentioned before. If there be father and son, and the son disseise the father, and being in possession makes a feoffment in fee, in the life-time of his father, tho' no right or estate is yet descended upon him from his father; yet this feoffment will bar him of his future possible right, when it does descend and come to him. But this is grounded on a particular reason; that is, because he had more than a mere right, for he had the possession of the land, and therefore might make a legal conveyance thereof; and the law favours extinguishment of rights, so that the right and possession may go together: Besides, a feoffment is of an high consideration in the law, because executed by livery, and causes a transmutation of the possession, and therefore is carried even to the extinguishment of former rights, in favour of him who has the conveyance; for by this feoffment he did not convey a bare right only, but the estate also. So that the feoffee might by law make a feoffment thereof, and by implication, upon such feoffment and livery, all future rights of him that made it are extinguished; for being in possession, and conveying the land itself, he conveys all rights attending thereon, whether present or future; but yet this does not bar his heir at law, for he may enter notwithstanding; and as to him the right is not absolutely extinguished; tho' at the same time this feoffment is good against him that made it.

Note.

This general rule again admits of another exception; and that is in the case of a release with warranty, where a man makes a feoffment with warranty, that warranty will bar a future right, and that will go to the heir * and bar him too; but then that is grounded on a particular reason, wherefore the warranty bars, because

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because to avoid circuity of action; for if the heir of him that made the warranty should recover the land against his father's grantee, this land, when it descended to him, would be assets in his hands, and would be liable to the warranty; so that it works an extinguishment of this future right, by way of rebutter. But there is no case in all the law, that by any legal conveyance at common law, a man could convey lands that he had no right to, nor in possession thereof at the time of such conveyance. In the first case he had not the possession, nor any present right, but if he had, by the release it would have been extinguished to him that had the possession; because that the possession, which the law favours, should not be disturbed; but future rights it was never extended to.

Yet the law has allowed releases of rights, which are in the nature only of possibilities, that a man may release to him that has the possession a possible right only, tho' it does not allow him to transfer or convey away to a stranger such a right; and that is the reason the law allows a man to release an executory interest in a term which he has devised to him, and is in the nature only of a possibility; but yet he cannot assign it away to a third person, tho' he may, as I said before, release this right to the possessor of the land by way of extinguishment. So that the rule of construction of conveyances at common law, will be the true rule to expound this statute.

But to narrow this question a little more; I do agree, that devises of land have not been subject to the strict rules of conveyances at common law, because the law favours disposition by will to make them agreeable to the intent of the testator; whereas conveyances at common law stand on a different foot.

In the case of wills the testator is *inops consilii*, and has no opportunity of observing the formalities of law, and therefore wills are not in all cases subject to the rules of conveyances at common law; but then all this * is grounded on this supposition, that * P. 153. the testator has wherewithal to make disposition of.

Let us then consider, how the law makes a construction in what comes nearest to wills; and that is conveyances of land to uses, which the statute of 27 H. 8. has executed into possession. The rules of construction in these cases are the most proper rules to be adapted to wills. Conveyances to uses.

Wills have been all along construed according to the intent, and so has the law all along supported those conveyances to uses, on the supposed intention of the party, tho' there should be some defects in them. The law has done the same as to wills; they are likewise supported according to the intention of the party, to supply such little defects as may be in them.

Now by conveyances to uses at common law; could any man convey an use in land which he had not at the time of making the conveyance? No, surely he could not; and that is plainly

H h

proved

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proved by a case cited at the bar, viz. *Yelverton and Yelverton*, 3 *Cro.* 401. There the father covenanted to stand seised of lands which he afterwards should purchase, to the use of himself for life, and after to his youngest son and his heirs; and afterwards he purchased lands and died: And the question was, Whether the eldest or the youngest son should take? And it was there resolved, that no use could arise to the youngest son, being of land he had not at the time of the conveyance; and that is grounded on very great reason, because he cannot raise an use of land which is not his own; for if a man that has no right to the land, can raise an use of that land, then two at the same time might raise uses; for it cannot be denied, but he that is owner of the land, may dispose of it, or raise what use he pleases, and that he is the proper person on a sale to declare the use. It is impossible the same land should be to the purchaser for life, with remainder to the youngest son and his heirs, and at the same time should be to him and his heirs. These would be to make contradictory * uses in being at one and the same time, as being declared by different persons.

* P. 154.

It is allowable indeed in the law, for a man to covenant that he will purchase lands by such a time, and levy a fine thereof, and that the same shall be and enure to such and such uses, but then the reason of that is, that when the land is purchased and fine levied, the use arises on the fine, and not on the deed made by him before he was owner of the land; and tho' he could not declare the use before he had the land, yet the fine by relation raises the use, and the deed made before is only an evidence of his intention, that it should be to such uses, if no uses were declared at the time of levying the fine; for at that time he might declare other uses; but no other uses being declared, that deed serves for an evidence of the intention of the party, no other intention appearing.

To apply that to this case; here is a conveyance by will made, whereby land is disposed of, which he had not at the time of making the will, and is a disposition to take effect *in futuro*; and so was that case, a grant and disposition of land, when he should purchase it, so this will cannot be a present disposition of what he had not, but a declaration how the land should go at his death. But it is very plain that the making of the will is the foundation, and is an inchoate disposition, so that if the deviser has not the land at that time, it will not pass.

There is yet a further reason why wills should receive such a construction as conveyances by way of use, and why they should imitate such conveyances; because it appears, that that act of parliament, of wills, was made to supply the powers of declaring uses by mens last wills and testaments, which they had before the stat. of 27 H. 8. of uses. For tho' the subject before the act 32 H. 8. had not any power to dispose of their lands by

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by their last will, yet they had what was tantamount, which was a power to declare uses by their last will; for before the 27 H. 8. of uses, which executes the possession to the use, all the lands were subject to *cestui que use*, and he had a power to declare the uses of the land, the trustees * had the possession, as he thought fit, either by deed or will, so that in effect he had a power of devising by will, by declaring the uses that the trustees should stand to, after his death. But when the statute of 27 H. 8. came and executed the possession to the use, then the *cestui que use* had no longer any such power of declaring the use as before, because then the use and the lands were the same thing, being united together; and that is the reason why this statute of wills gave men a power to dispose of their lands by will, which was given in lieu of that power which *cestui que use* had before of declaring the uses of the land, as he thought fit; and therefore there is a great deal of reason a will should receive the same construction. * P. 155.

But it is objected, that a will is not to be construed according to conveyances by deed at common law, because a will is no present and immediate disposition of land, and is not like a deed that takes effect immediately by delivery; for in such cases a man must have the land at that time, else it is against the nature of a grant or immediate gift, to dispose of what he has not, but that a will is another thing. It is only a future disposition in case the man dies without any other alteration; and is ambulatory, and not completed or consummated till his death; and therefore reason good he should be able to dispose of the lands he should have or purchase at any time before his death, because it does not take effect till his death. Objection.

Now in answer to this objection, I shall distinguish to what purposes a will does not take effect till death, and to what purposes it does take effect from the time of making and before the party's death. 'Tis true, to many purposes a will takes no effect till the testator's death, but on the other hand, to many other purposes it takes effect from the time of making only. The law does require many qualifications necessary to be in the testator at the time of making the will, which should they come at any time after, tho' before his death, would make the will void, and the lands would not pass thereby. Indeed * as to the vesting an interest in the devisee, the law has regard to the death of the party only, for no interest can vest in the devisee as long as the testator lives; and a will, in its own nature, is not to pass any thing but on supposition of the testator's death; for it is a provision and direction how his lands and estate should go when he can keep them no longer. Where a man devises lands to another, and the devisee happens to die before the deviser, this is a void devise, and the lands do not pass; for if they should, the heir of the devisee must take contrary to the intent of the deviser; Answer. * P. 156.

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visor; for by the will he was intended to take by descent; and if lands pass, he must now take by purchase. In this regard also a man's wife may take by his will, tho' she cannot take by any conveyance at common law; for the will not taking effect, in point of transference of an interest, after the husband's death, she is in nature of a stranger, and so the land will well pass to her; and in many other cases of this nature, which I could mention if necessary, a will takes no effect till the death of the testator.

But when you consider another thing necessary to make a will good, as a necessary qualification in the testator, which is the power and capacity of disposing by his will, there I take it the law regards the time of making the will; and as to the power of disposing lands by will, that consists of several particulars. As,

1. To enable the testator to dispose by will, or any other way, the law requires he should have an interest in the thing he is to dispose of; and if he has nothing in the thing to be disposed of, how can he be said in any sense to have a power of disposing it.

2. The testator must not only have an interest in the thing devised, at the time of making the will, but must have a disposing mind too; he must have ability and capacity, in point of discretion and understanding, as a rational man, and these two qualifications are necessary to make up the power of disposing; and this power must be perfect and compleat, at the time of making the will; and none of those qualifications coming after, tho' before * the death of the testator, will make this power good, and the will effectual in the law; these are personal qualifications, and must be had at the time of disposing, and will be too late to come after.

Now as to the qualification in point of discretion; if a man be *non compos*, and not in his right senses at the time of making his will, tho' he afterwards, never so long before his death, becomes a man of understanding, and sound judgment and memory, yet the will is a void will, and will by no means be made good; because he wanted the disposing power at the time of disposition, which was the time of making his will. So the law is the same of a feme covert; if a married woman makes a will, tho' she becomes a widow and unmarried before her death, yet such is a void devise without republication; for the law here regards the time of making only. So it is in the case of an infant; if he makes a will, tho' he be of age, nay tho' never so old, when he dies, yet it is a void devise; because he had not discretion, nor a disposing mind at the time of making; for it is that which the law regards in these cases, and not the time of the death of the testator.

Then

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Then as to the other part or necessary qualification, which goes to the power of disposing, which is ownership of the land; the law requires that to be compleat at the time of making the will. Consider as to this point, the law is very strict that the testator should have a disposing power at the time of making the will; for it is so far from allowing a subsequent power, by acquisition after, to make the will good, that the law requires a continuance of the same interest, that the deviser had at the time of making the will, to remain unaltered, even to the time of his death; for that any, even the least, alteration of this interest, is an actual revocation of such will: As where there is a tenant in tail, and he makes a will and devises these lands away; now tho' he has an inheritance in these lands, and they are his own, and he could dispose of the absolute inheritance and fee-simple by fine and recovery, yet if after the making such * will, * P. 158. at any time before his death, he suffer a recovery to him and his heirs, and alters the estate from a tail to a fee, this is so far from making his will good, that it is an actual revocation of the will, yet he was owner of the land when he made the will, and is no more now, but only the estate is altered, and he has now another sort of fee. Nay the law is still stricter; as where there is tenant in fee-simple, and he devises his lands away to another, and after that, and some time before his death, makes a feoffment of these lands to another, to the use of himself and his heirs; tho' this to some purposes is no alteration, for he is absolute owner of the estate as before, yet this does not make the will good, but is a revocation thereof; and so it was adjudged in the case of my lord *Lincoln*, tho' so small an alteration was in the estate.

Now this shews the law requires the testator should have a compleat power of disposing at the time of making the will; and that that power and interest, he had at that time, should continue, and be the very same at the time of his death.

Now if the law will not allow any the least alteration of estate from that which he had at the time of making the will, but will rather work a revocation and destruction of that will; I do not see how the testator's purchasing after can work here to make the will good, when he had nothing at all, no interest in or to the land at the time of making the will: This is a far greater alteration than from a tail to a fee, or from one sort of fee to another. For this is an acquisition of a new right and a new power; it is totally a new interest purchased after making the will, when he had neither right or interest at the time of the will, which can never have effect to make this will good. So that as to the power of disposing of lands by will, the law requires the deviser to have this power compleat and entire, both in regard of the estate and interest to be disposed of, and in regard of the testator's understanding and discretion, which are

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* P. 159. necessary to be had at the time of * making the will ; and these things, tho' they happen afterwards, tho' never so long before his death, yet they come too late to make the will good. So that if this act of wills were now *de novo* to be construed, it would receive this construction, that a man's having lands, so as to give him a power to devise them by will, by virtue of the said act, must be meant, having those lands at the time of making his will, and not at the time of his death only.

But then in the second place, this being a law made a long time ago, has received many uniform determinations agreeable to this construction : This ought to be of great consideration always, that the law may be certain, when there have been solemn determinations after long debate, and an acquiescence under them ; and when accepted and received as a rule of property, tho' some should not be satisfied in their private judgments, were the matter to be newly resolved, it is but reasonable we should acquiesce and determine the same way, to prevent greater mischiefs which might arise from the uncertainty of the law. Now there have been several solemn resolutions, and acquiescence under them, that a man cannot dispose of lands before he has them.

As to the case of *Brett and Rigden*, I do not think that to be a determination of this point. That case was no more than this : A man had lands in a certain parish or place, and made his will, and gave away all his lands in that parish, and afterwards, some time before his death, purchases other lands in the same parish ; and the question was, Whether these new purchased lands should pass or not ? And held they would not. But that judgment was not grounded on this question, Whether the testator could devise lands he had not ? But whether the words of the will, in point of intention, could extend further than to those lands he had at the time of making the will, there being in that will no future words, nor declared intention, of passing any lands he should purchase *in futuro* ? That judgment went rather on a supposition that the intention of the testator was satisfied, in passing those lands the testator had at the time of making the will ;

* P. 160. * for there being no future words in the will, it might be the intention of the testator that the devisee should have the lands he had at the time of making his will, and his heir have the new purchased lands by descent. But there are some cases in point with this : As *Butler and Baker's* case in the third part of my lord *Coke's* reports, and *Leonard Loveis's* case in the tenth report of my lord *Coke* ; they go expressly on the word *having* at the time of making the will ; and this has been all along taken as the rule ; and all people ought to acquiesce therein, being so often and so solemnly in this manner determined.

And

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And now I come to the second matter on which this case depends, and that is the custom.

Whether, tho' it should be allowed, that by a will a man cannot dispose of lands which he had not at the time of making the will, and which he purchased afterwards, yet whether such devise may not be by such custom as is here found? And whether such custom will not make this devise good? And I am of opinion it will not.

The custom found is no more than that gavelkind land may be devised by will in writing: But there is no such custom found, as that a man may devise gavelkind land that he had not, but only that gavelkind is devisable.

If it be a reasonable construction of the act of wills, that to enable a man to devise, he should have the land at the time of making his will, why should not this custom be so expounded, since the custom is only to enable a man to devise land; if it be a reasonable construction as to common socage lands, why not as to gavelkind lands, since there is no more particular in one case than the other. And the rather because all customs, which are against the common law of *England*, ought to be taken strictly, nay very strictly, even stricter than any act of parliament that alters the common law.

It is a general rule, that customs are not to be enlarged beyond the usage; because it is the usage and practice that makes the law in such cases, and not the * reason of the thing, for it cannot be said that a custom is founded on reason, tho' an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage; and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom. * P. 161.

Now in construction of acts of parliament it is otherwise, and there is a greater latitude allowed in them; and the reason that induced the law-makers to make such acts, to take away the common law, may be and is usually urged in making construction of them. Therefore in doubtful cases we may enlarge the construction of acts of parliament, according to the reason and sense of the law-makers, expressed in other parts of the act, or guess, by considering the frame and design of the whole. But it is not so in the case of a custom, because not founded on any particular reason; for the reason of the common law is against it; but the law allows usage in particular places to supersede the common law, and is the local law, which is never to be extended further than the usage and practice, which is the only thing that makes it law.

Now

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Now there is nothing here found of a usage to devise lands which a man had not, or which he should afterwards purchase; and we must not enlarge this custom to devise lands, which the devisor had not at the time of making the will, which is beyond a reasonable construction; for tho' it be lawful and customary to devise lands a man has, yet it does not follow, that by the same reason a man may devise the lands he has not, for it is on different considerations; because the common law enables a man to dispose of what he has; but there is not the same parity of reason, that custom should enable a man to dispose of what he had not; nor did it ever give a man leave to dispose of what he had not, it being a thing against reason, that any man should

* P. 162. have a right to * dispose, when he had not the thing to be disposed of, therefore it ought not to be carried in parity of reason further in a custom, which ought to be construed more strictly than it would be at common law.

But then it is further objected, that this custom is a general power of disposing, as far as a man may, his goods and chattels at common law, which he may devise, in manner as is contended the lands ought to go in this case. For it is said, they say, in *Fitzberb. Nat. Brev.* That this custom of gavelkind land is to devise lands *tanquam bona & catalla*. But surely these words do not prove that gavelkind land, by such custom, may be disposed of to all intents and purposes, as goods and chattels: There is most certainly a great deal of difference between a devise of lands and a devise of goods and chattels; goods and chattels were always taken to be testamentary things. If a man make a will, the law gives all his goods and chattels and personal estate to his executor; by his being named executor, he has a right to all the personal estate; and if a man makes no will, the ordinary did dispose of the intestate's estate, till the statutes for granting administration were made; so that as to the personal estate, the law did appoint no person who should take in succession as to that, unless the testator did dispose thereof; but as to lands, the law has appointed the heir to represent the ancestor, and to succeed him in his inheritance; therefore lands ought not to go from the heir, to whom the law has given them, otherwise than as expressly devised from him to some other.

And tho' the testator does dispose of his goods and chattels by his will to legatees, yet they all pass to the executor, and he has them in the nature of a trustee; and he alone has a title in law to them, and nothing passes to the legatee; nor can any legatee take any thing devised to him until the executor do assent; so that this in effect amounts to no more than a direction to the executor how he shall dispose of his testamentary estate, when debts and funeral expences are paid.

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* Testaments of goods and chattels are by the civil law, and * P. 163.
of ecclesiastical conuſance, and ſubject to the rules of the Spiritual Court, and to be governed by their law; but as to lands nothing enables a man to take but the common law, and the heir is in by deſcent, as being the perſon appointed by the common law to ſucceed and repreſent his anceſtor; and if lands are deviſed away by a will from the heir, they paſs immediately by the will to the deviſee. So that there is a mighty difference between a diſpoſition of lands, and of goods and chattels.

The caſes cited at the bar to maintain this deviſe were *Brook*. 15. tit. *Deviſe*. *Fitzh. Abr.* 17. and *Statbam's Abr.* 11. the ſame title; and theſe were preſſed as authorities in point.

All theſe caſes are founded on the year-book of the 39 *H.* 6. I have looked into that book, but that does not by any means warrant any ſuch opinion, for the principal caſe was no more than this: A man deviſed land, and was after that diſſeiſed, and then died; the queſtion there was, Whether it was a good will, becauſe he did not die ſeiſed? And their opinion ſeems to be, it was not a good will, becauſe he did not die ſeiſed. And then the book ſays, but ſuppoſe a man ſhould, after making his will, purchaſe land; and there is no reſolution as to that, but only a *quære*. So that theſe books are only collections and inferences upon the 39 *H.* 6. which warrants no ſuch thing, but rather the contrary; eſpecially if it be conſidered this caſe muſt be on a cuſtom to deviſe, becauſe long before the ſtatute of wills.

And therefore, for theſe reaſons, I think the plaintiff ought to have his judgment.

* Mayor of London *verſus* Mackreith.

* P. 164.

(5.) **E**RROR out of the Common Pleas; the caſe was this: In what caſe
The mayor of *London* brought an action on the caſe on a a man may
by-law, in the Sheriff's Court in *London*, and had judgment; the be both judge
defendant brings a writ of error in the huſtings, according to the and party.
cuſtom of *London*, and was bound in a bond to the mayor to 1 Salk. 396.
proſecute it with effect; upon which bond the mayor brings 7, 8.
debt in *C. B.* and at laſt it comes by writ of error into *B. R.* Holt 396.
where the only queſtion was, Whether the defendant was obliged
to proſecute the writ of error in the huſtings, the mayor
being judge of that court, and ſo make him both judge and
party.

This caſe was 'twice argued the laſt term; and now the court gave their opinion.

Holt Ch. Juſt. ſaid, the writ of error would not lie before the mayor himſelf, becauſe he was party, and ſo the bond void.

Hilary Term 6 Ann.

Powell contra. He agreed, that regularly a man cannot be judge and party; but in cases of necessity he may: As if a real action be brought against all the judges of *C. B.* But this case differs from that, for the hustings may be held before six aldermen, without the mayor, and then it shall be intended that the mayor was absent, because it does not appear of record. If the plaintiff in his replication had replied, that the mayor gave the judgment, I should have been of another opinion; and it does not appear that the mayor is a necessary part of the court.

Powis and Gould were of the same opinion, that the writ of error was well brought, and so the bond good; and the judgment given thereon in *C. B.* affirmed.

* P. 165.

* *Queen versus Apfley.*

Sessions cannot displace without cause
2 Hawk. P.C.
134.

(6.) **T**WAS moved to quash an order of sessions, for removing the keeper of the house of correction; it being to discharge him for divers and sundry crimes, not specifying what crimes in particular; and 'twas said, that place is not at the will of the justices, neither by the common law, nor by the statute.

Curia. The justices have power to turn him out for misbehaviour, but not arbitrarily; they ought to have specified the cause in their order; and 'twas therefore quashed.

Anonymous.

Indictment.
Caption *pro*
burgo, &c.
quashed.
2 Hawk. P.C.
215.

(7.) **N**OTE; In this term, upon the motion of Mr. King, two indictments were quashed; because in the caption 'twas said, *per sacramentu' duodecim proboru' & legaliu' pro burgo prædict'*, instead of *burgi prædict'*; so that it did not appear they were of the burrough.

* Easter

* Easter Term, 1708.

* P. 166.

7 Annæ Reginae in B. R.

Queen *versus* Wrightson.

(1.) **T**HE defendant was indicted for saying of Sir Rowland Winn, who was a justice of peace, these words, *Sir Rowland Winn is a fool, an ass and a coxcomb, for making such a warrant, and understands no more how to make a warrant than a stick-head*; and the defendant being found guilty on the trial, moved in arrest of judgment.

Indictment for words spoken of a justice of peace. Vide post (Queen v. Shaftoe) 195. 2 Salk. 693. Holt 354. S. C.

Mr. *Salkeld* for the defendant argued, that these words are not indictable, for that they only concern the person of the magistrate, and not the government: Indeed if one reflects on a justice of the peace, either for his office or his honesty, 'tis a question whether an indictment lies; but this censures only this particular act. Besides it does not appear what the warrant was.

Mr. *Eyre* for the queen argued, that the indictment was maintainable; for tho' this does not reflect immediately on the government, yet the government is obliged to maintain the instruments of its authority: Besides the words censure him in the execution of his office, viz. as a magistrate. *Hutton* 131. *Cro. Car.* 503. 3 *Mod.* 139. This is not like reflecting on an officer in a corporation; for one is by commission immediately from the crown, the other by election; the one reflects on the public government, the other on the corporation only.

* This being argued several times, the court gave their resolutions this term, that the indictment did not lie. * P. 167.

Holt Ch. Just. said, he knew no case like this, but the *Queen* and *Darby*. Indeed words spoken in disparagement of a justice's parts is a breach of good behaviour, but not indictable: Besides the indictment does not set forth, that this was a legal warrant; it ought to appear to the court, what sort of a warrant it was; for if it was a foolish warrant, or of a matter whereof he had no cognisance, it was lawful to say so. The words, perhaps, may be true, and justices of peace are not beyond censure.

3 *Mod.* 139. *Comb.* 65. *Carth.* 14. S. C.

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Powell the same; and said, If the words were not indictable, they were much less actionable; and *Powis* and *Gould* agreed. And in this case were cited by *Holt* Ch. J. 3 *Keb.* 492. 2 *Roll Abr.* 78. 4 *Iust.* 181. And the case of *Sely* for abusing the mayor of *Salisbury*.

Queen *versus* Butheir.

Indictment
on 1 R. 3.
c. 3.
Str. 788.

(2.) **A**N indictment on 1 R. 3. c. 3. whereby 'tis enacted that, *If any one out of the King's obeisance, exercise any trade here, they shall forfeit their goods and chattels; and in the indictment it was, non natus infra regnum; which may be, and yet be within the Queen's obeisance; and therefore it was quashed.*

Turton *versus* Prior.

[*Holt absent.*]

Attornies of
C. B. their
privilege.
2 *Roll Abr.*
274, 275.
Lutw. 28.
Ld. Raym.
93.
12 *Mod.* 102.

(3.) **A**N action brought against an attorney of C. B. who was in custody of the marshal of the King's Bench, at the suit of another; and in this action they declare against him *in custodia mariscalii*.

The defendant pleads his privilege, as an attorney of C. B. that he ought not to be sued in B. R. and the plaintiff replies as follows: (a)

Replication
to a plea of
privilege,
that at the
time of ex-
hibiting the
plaintiff's
bill, the deft.
was in custo-
dy of the
marshal, under
an *hab. corp.*
cum causâ.

Et prædictus Robertus dicit quod prædictus Arthurus ad idem placitum suum de privilegio, prædictæ curiæ dominæ reginæ de banco, modo superius placitat' admitti non debet; quia dicit quod ante diem exhibitionis prædictæ billæ ipsius Roberti versus prædictum Arthurum, scilicet 23^o die Octobris anno regni dictæ dominæ reginæ nunc sexto supradicto, quoddam breve dictæ dominæ reginæ, de habendo corpus prædicti Arthuri, e curiâ ipsius dominæ reginæ coram ipsâ dominâ reginâ emanavit (eâdem curiâ apud Westmonasterium in comitatu Middlesex tunc existente) vicecomiti Middlesex directum; per quod quidem breve eadem domina regina prædicto vicecomiti Middlesex præcepit, quod corpus ipsius Arthuri Pryor, in prisonâ ipsius dominæ reginæ sub custodiâ suâ detentum, sub salvo et securo conductu, unâ cum die et causâ captionis et detentionis suæ, quocunque nomine idem Arthurus conservetur in eâdem, haberet coram dilecto et fideli ipsius dominæ reginæ Johanne Holt milite, capitale justiciario dictæ dominæ reginæ, ad placita in curiâ ipsius dominæ reginæ coram ipsâ reginâ tenendum assignato, apud cameram suam scituatam in Serjeant's Inn, Chancery Lane, London, immediatè post receptionem istius brevis, ad faciendum et recipiendum ea omnia et singula quæ idem capitalis justiciarius dictæ dominæ reginæ de eo adtunc et ibidem consideretur in eâ parte; et quod haberet

(a) The replication in this case is now first published, from the MS. of Mr. *Lutwyche*.

ibidem

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ibidem tunc breve illud. Posteaq. scilicet 13^o die Novembris, anno regni dictæ dominæ reginæ nunc sexto supradicto, Benjaminus Green Armiger et Carolus Peeres Miles, tunc Vicecomite Middlesex existent', prædicto Johanni Holt militi, capitali justiciario dictæ dominæ reginæ ad placita in curiâ ipsius dominæ reginæ coram ipsâ reginâ ut præfertur tenendum assignato, breve de habendo corpus prædicti Arthuri retornavit; et per quandam schedulam eidem brevi annexam certificavit, quod ante adventum illius brevis scilicet decimo die Novembris, anno regni dictæ dominæ reginæ sexto prædicto, Arthurus Pryor generosus, in dicto brevi nominatus, captus fuit per ipsum præfatum vicecomitem, et in prisonâ dictæ dominæ reginæ sub custodiâ suâ tunc detentus fuit, virtute brevis de capias, retornabilis coram justiciariis dictæ dominæ reginæ apud Westmonasterium, a die sancti Martini in quindecim dies, ad respondendum Edwardo Holt generoso de placito transgressionis, ac etiam in placito transgressionis super casum super assumptionibus, ad damnum ipsius Edwardi 50*l.* quodq. tunc detentus fuit etiam virtute billæ Middlesex, retornabilis coram dictâ dominâ reginâ apud Westmonasterium die Veneris proximæ post quindenâs sancti Martini, ad respondendum Johanni Filks de placito transgressionis ac etiam billæ pro 30*l.* super assumptionibus: Quodq. idem vicecomes corpus prædicti Arthuri tunc paratum habuit. Ac superinde prædictus Arthurus, virtute prædicti brevis de habendo corpus, per prædictum vicecomitem Middlesex, coram Henrico Gould milite uno justiciarorum dictæ dominæ reginæ ad placita in prædictâ curiâ ipsius dominæ reginæ coram ipsâ reginâ tenendam assignato, apud cameram suam scituatam et existentem in Serjeant's Inn prædict' in Chancery Lane, London, in parochia Sancti Dunstani in occidente, in wardâ de Farringdon extra, eisdem die & anno ultime mentionatis, ductus existens, ad tunc et ibidem per eundem justiciarium commissus fuit custodiæ mareschalli mareschalliæ dominæ reginæ coram ipsâ reginâ, oneratus in executione pro damnis prædictis ac etiam in seperialibus causis prædictis, pro quibus per vicecomitem prædictum ut præfertur detentus fuit; Prout per breve de habendo corpus prædictum, retornum inde, et commissionem prædicti Arthuri, in prædictâ curiâ dictæ dominæ reginæ coram ipsâ reginâ, (eâdem curiâ apud Westmonasterium in comitatu Middlesex prædicto existente) de recordo remanentes liquet et apparet. Virtute cujus quidem commissionis, Willielmus Broughton armiger (ad tunc et adhuc mareschallus mareschalliæ prædictæ curiæ dominæ reginæ coram ipsâ reginâ existens) prædictum Arthurum in custodiâ, in executione ad sectam prædicti Edwardi Holt pro prædictis 31*l.* ac pro defectu manucaptorum ad sectam prædicti Edwardi Holt et Johannis Filks in prædictis seperialibus aliis actionibus, tunc et semper postea in salvâ et arctâ custodiâ habuit et detinuit, et adhuc habet et detinet. Ipsoq. Arthuro, sic prisonario in custodiâ prædicti

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mareschalli mareschallia, prædictæ curiæ dictæ dominæ reginæ coram ipsâ reginâ, in executione ac pro defectu manucaptorum, ut prefertur remanente et existente, ipse idem Robertus 24^o die Novembris, anno regni dictæ dominæ reginæ nunc sexto supra dicto, et non antea, exhibuit hic in curiâ versus prædictum Arthurum billam suam prædictam: et hoc paratus est verificare, unde ex quo prædictus Arthurus, sic prisonarius in executione in salvâ et arctâ custodiâ existens, aliqua negotia ligeorum dictæ dominæ reginæ in prædictâ curiâ de banco, ut eorum attornatus, prosequi seu defendere non potest, idem Robertus petit iudicium, si prædictus Arthurus ad placitum suum prædictum habendum, privilegii prædictæ curiæ dictæ dominæ reginæ de banco pro attornatis ejusdem curiæ, modo superius ut prefertur placitatum, admitti debeat &c. et quod prædictus Arthurus ad prædictam billam ipsius Roberti ulterius respondeatur.

Will. Hale.

To this replication the plaintiff demurred specially, and assigned the following causes: Quod non apparet per replicationem prædictam, quod prædictum breve de habendo corpus, in replicatione illâ mentionatum, impetratum fuit ad requisitionem vel assensu prædicti Arthuri; ac etiam quod prædicta replicatio est minus justa, et caret forma, &c.

The defendant joined in demurrer; and on argument the plaintiff's counsel contended, that they might declare against the defendant in *B. R.* because he was actually *in custodia mar'*. But * P. 168. the court directed that the defendant * should be removed by *habeas corpus* to the Common Pleas, and that an action should be brought against him there.

Starr versus Rookby.

Custom for
occupatores to
repair. 2.
1 Salk. 335.
S. C.

(4.) **A**N action for not repairing of fences; and the plaintiff declares *quod omnes tenentes & occupatores* used to repair them; which the counsel for the defendant said could not be good, because they could not lay the custom for *occupatores*, and cited 4 *Mod. Stroud* and *Bitt's* case; *Yelverton* 75. *Cro. Eliz.* 45.

The counsel on the other side said, that *tenentes* may prescribe; and cited *Cro. Jac.* 665. *Book of Entries* 140. and said that, this way of pleading is used more now than formerly, and this is after judgment by *nihil dicit*. But the court seemed to incline that the prescription was not sufficiently laid.

Queen

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Queen *versus* Lord Griffin.

[Holt *absent*.]

(5.) **T**HE lord Griffin being brought by *habeas corpus* to the Queen's Bench, upon his outlawry, desired counsel to take exceptions to the said outlawry.

No counsel allowed after outlawry for treason.

See the stat. 7 W. 3. c. 3. s. 1.

But Powell (Holt Ch. J. being absent) denied it, and said, that tho' the statute gives counsel in high treason, at the trial, yet none is to be allowed after an outlawry; except the prisoner shew some particular error on which the court may assign him counsel; but the court is his counsel, and will do him justice, and on that execution was ordered to be awarded by rule of court; the Solicitor General then moved that some time might be pronounced, which he said the Ld. Ch. J. Holt told him was most proper. But the court said the practice had been otherwise; and directed that a rule should be awarded *quod fiat executio* generally.

* Billingsworth *versus* Spearman, &c.

* P. 169.

Holt Ch. J.
Powell, Powell
and Gold justices in court,

(6.) **A**N action of debt was brought against the defendants, whose wives were assignees of the term; it was brought only against the husbands, to which declaration there was a demurrer.

Debt against husbands and wives assignees of a term, &c.

Sir Edward Northey *pro def* said, The wives should have been joined in this action; and that the authorities were express, That if a lease be made to baron and feme, during the coverture, she must be joined; which is a stronger case than the present; 2 H. 4. 19. for here the right is only in the wife; and the husband has no interest but in her right. In waste, if the wife be tenant for years or life, the action must be brought against both, tho' the husband only do the waste. Cro. Eliz. 356. And he shall not be chargeable in this case, by reason of taking the profits. Indeed when the title is not known of the landlord, *prima facie* taking the profits is good evidence; but not if it be shewn that there is an under-tenant by lease, &c.

1 Salk. 297.
Holt 306.
S. C.
1 Sid. 266.

Whitacre *pro Quer* cited 26 Ed. 3. 64, 562. 1 Roll Abr. 10 H. 6. 11. F. N. B. 121. Keilw. 125. a. Ray. 6. 1 Lev. 25, 26.

Holt Ch. J. If the husband be seised of land in right of his wife, which is charged with a rent-charge, the action for the rent-arrear shall be brought against the husband only; but that differs much from this case, for that is by reason of taking the profits, for the rent is the profits of the land. Then he found a fatal fault, *viz.* That the assignee of the term had made an executor, who devised the tenements to the wives of the defendants, which could not be.

Powell.

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Powell. This action is brought against them as assignees, in respect of the interest in the term; and differs widely from the case of a rent-charge; for that is only in respect of taking the profits.

* P. 170. * Judgment was given on the last fault of the devise by executors; upon the opening of which point, *Holt* said, he thought an executor could not wave a term: For if he accepted part of the executorship, he must accept the whole, as he stands empowered by the will. 2.

Powell. If the rent be more than the term, he may shew it specially, and pray that he may be charged no otherwise than in the *detinet*. *Sed Holt contra*.

Busheell versus Haynes.

Debt on bail-bond not saying 'twas assigned.

Post 237.
Mod. Cas. 78.
Tucker v.
Goldburne.

(7.) **D**EBT upon a bail-bond, as assignee of the sheriff of *Sussex*, according to the late act of parliament; and declared generally, without shewing the matter specially, that it was a sheriff's bond, which by the late act is assignable; to which there was a demurrer.

Et per cur'. It should have been shewn that it was a bond assignable; and when Mr. *Salkeld* found the opinion of the court against him, he prayed to *discontinue*, which was granted, on payment of costs.

Lupart versus Welson.

Submission to an award, imports a covenant to perform.
Holt. 79.

(8.) **A**N action of covenant was brought on an agreement to refer all matters in difference to an arbitration; a difference arose about a certain demand, and the arbitrators awarded 500*l.* to be paid, and general releases to be given. 'Twas argued, That tho' no express words were in the covenant, that the defendant should perform, yet it should be good by implication. *Dyer* 216, 217. 8 Co. 82. 1 Roll Abr. 7. pl. 13. *Allen* 69, 70. 1 Lev. 113. 1 Sid. 160. 1 Ventr. 69. *Lutw.* 575. For wherever there is an equitable interest, it is sufficient to submit to an award. *T. Jones* 158.

* P. 171. *Holt* Ch. J. The very referring a thing to arbitration is a mutual undertaking, that each party shall perform * his part of the award; for otherwise it cannot be said to be referred. Cannot one who is a stranger covenant, that a third person shall perform the award between A. and B.? This indeed cannot bind the man to a performance, but it will be a breach of the other's bond. If a man assigns a bond, and afterwards brings an action thereon in his own name, this is a breach of the agreement: For the

very

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very assignment imports a covenant, that the assignee shall bring the action, in the assignor's name, and recover, and have the money to his own use. Antiently, if an award was made to pay a sum, this might have been pleaded in bar, tho' without satisfaction; because the law gave an action of debt for the money upon the award, and so a remedy. And tho' that law be now altered, yet now, when two persons submit to an award, this amounts to *mutual promises*.

Inter Oakham and Whittlesea Parishes.

(9.) **A**N order was made by two justices to remove a poor man, *except he finds security to be allowed by them, (i. e. the two justices.)* And Mr. Page excepted thereto for that reason; and also, that it did not say, he was likely to become chargeable, or, that he came there to settle, not having 10*l. per annum*. *Holt Ch. J.* they cannot make a conditional order; or, that in case he does not find security, then to remove him. For an order of removal is an adjudication, and ought to be absolute. And they have nothing to do with the security, for that belongs to the parish, and is not to be allowed, or disallowed, at the justices discretion.

Then Mr. Raymond moved to set aside the *certiorari*, by which the order was removed, because in the order the town was spell'd *Oakham*, but in the *certiorari* *Okeham*.

Sed non allocatur; and the *certiorari* was confirm'd.

* Queen versus Jay.

* P. 172.

(10.) **I**N the beginning of this term, a writ of *certiorari* was quashed; because it was directed *justiciariis ad pacem assignat'*, omitting the words *ad conservandum*.

Queen versus Atkins.

(11.) **A**N order of two justices was on the father of a bastard-child, that he should pay 1*s. 6d. per week* from the time of the birth of the child till it be ten years old, and then to pay 5*l.* for the putting it out apprentice; 'Twas objected, that the order was not according to the statute; for 'tis uncertain whether it will be chargeable so long as till ten years old. It ought to have been, To pay so much, &c. so long as the child is chargeable to the parish. Which the court agreed; and therefore quashed the order. See *The Queen v. Collins*.

M m

Queen

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Queen *versus* Digg.

Writs of ex-
com' cap'.
quashed.
Burn. Eccl.
Law, tit.
Excommuni-
cation, p. 201.
&c.

- (12.) **M**R. Page moved to quash a writ *de excommunicato capiendo*. His first exception was to the *significavit* upon the *excom' cap'*. That it did not therein appear, that the person was commorant in the diocese. *Moor* 466, 467. 2dly, That it does not appear there were forty days between the *excom'* and the *significavit*; that so the party may reconcile himself to the church before the *excom' capiend'* issues. *Cro. Car.* 82. The *significavit* is recited in the *excom. capiend.* This writ is returnable here, and after it is so returned, this court may well quash it, if it be a bad writ; but before it is returned here, the chancery upon motion, if it be a bad writ, is to grant a *superfedeas* to it. As to which the court ordered precedents to be searched. A third exception was, That it did not appear, that the excommunication * was since the last general pardon. Which exception the court seemed to allow.

Queen *versus* Haynes.

Holt 658.
S. C.

- (13.) **M**R. Pengelly also moved to quash an *excom' cap'*; For that it did not appear in the writ, that the crime alledged was of ecclesiastical conusance. *Raymond cont.* Tho' that matter does not appear in the writ, yet it appears throughout the proceedings, that this was a cause before the delegates, and therefore it shall be intended of ecclesiastical conusance: But the court held, it ought to have appeared so in the writ; and therefore held the writ naught, and quashed it. See the stat. 5 *Eliz. c.* and *quare* The bishop of St. David's case, and the case *infra*.

Queen *versus* Blower.

Subtraction
of tythes.
Ld. Raym.
817.
7 Mod. 56,
117.

- (14.) **A**L SO in this term Mr. King moved to quash another writ of *excom' cap'*; For that it only recited, to be for a matter of tithes or other things of ecclesiastical jurisdiction, and did not set forth what things particularly. And the writ was quashed for the said *incertainty*; and for that it being laid disjunctively, or other things, shew'd that it might be for something else of ecclesiastical conusance besides tithes; and what that is does not appear.

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Queen *versus* Cope.

- (15) **A** Writ of error to reverse an outlawry: The error for which it was reversed was, because *in secundo exaeto* it does not appear where the county-court was held.

Outlawry reversed.
See the case of the King v. Wilkes, in 4 Burr. 2527. &c.

* Queen *versus* Corp. of Cornwall. [Holt *absent.*] * P. 174.

- (16.) **N**ON *fuit electus* is a good return to a *mandamus*: But to set forth that a burgess is *præfatus & juratus*, which is no more than that he is preferred and sworn to that office, is not good.

Return to a *mandamus*.
Fitzgib. 195.
but see 1 Str. 894.

Queen *versus* Dy. [Holt *absent.*]

- (17.) **N**O indictment will lie on the statute of usury: For the method the act prescribes must be followed; therefore the indictment was quashed.

No indictment lies on the statute of usury.
Ld. Raym. 1144.
2 Salk. 680.
S. C.
But see the 12 Ann. c. 16.

Jenkins *versus* Plome.

- (18.) **W**HEN an executor brings an action as executor, where he need not name himself executor, and it goes against him, he must pay costs, as 'twas judged in the case of *Elways and Mocata*, in *Salk.* 314. *Farest.* 48. and 2 Lord Raym. 865.

Costs by executors.
1 Salk. 207.
3 Salk. 105.
6 Mod. 91.
181.
Holt 313.
S. C.

* Trin.

* P. 175.

* Trin. Term, 1708.

7 Annæ Reginae in B. R.

Holt Ch. J.
Powell, Pow-
is and Gould
Justices.

Of peremp-
tory *manda-*
mus, and of
bills of ex-
ceptions.

1 Salk. 288.
Holt 301.
S. C.

The effect of
bills of ex-
ception, to
be minuted
and signed by
counsel at the
trial.

Wright *versus* Sharpe.

(1.)

AN action on the case for a false return to a *mandamus*; verdict and judgment for the plaintiff. A motion was made for a peremptory *mandamus*, and Mr. *Page* opposed the motion; because a bill of exceptions was tendered for refusing a book to be given in evidence on the part of the defendant: But *note*; nothing was mentioned of a bill of exceptions at the trial, nor any thing done in it till after verdict.

Powell J. upon the making this motion, was of opinion, That whether the bill was mentioned in time or not, that it should not stop a peremptory *mandamus*. If a motion had been made for a new trial, it would have hindered it; and a new trial would have been granted for refusing of evidence; but he said, if a writ of error had been brought, it would not stay the peremptory *mandamus*; and therefore a peremptory writ was granted, *per cur'*.

And as to the tendering the bill of exceptions, he said, some minutes of it should have been drawn up at the trial, and the counsel on both sides should see it, and set their hands to it, to put it out of all dispute afterwards. That the statute *W. 2. c. 31.* says, *scribat exceptionem*, which must be understood to be at the trial. But this point was adjourned to be spoke to by counsel.

Afterwards, at another day this term, Mr. *Eyre* for the bill cited the *Register* 182. where the writ to compel the * judge to set his seal, mentions no time but when it should be demanded; and 'tis very probable, if it should be done at the trial, it would appear in the writ; he cited *Raft. Ent. 293. F. N. B. 64. 6. The Old F. N. B. 21. letter N.* No notice taken of the time of the prayer of it. *Raym. 404, 405.* And besides he said, the party was not aggrieved till after verdict. Also *Page* spoke to the same effect.

Sir

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Sir *Edward Northey*, against the bill of exceptions, argued from the inconveniencies that would attend such practice, if it should be allowed, that after a trial in a long vacation they might come and tender a bill of exceptions, when the judge, who tried the cause, had quite forgot the thing insisted on; and so no man that had a verdict could ever be secure.

Mr. *Raymond* of the same side said, that this was a plain case, by the very words of the statute; and that minutes should be taken of it at the trial, just like a special verdict, and demurring to evidence: As to the objection made by Mr. *Eyre*, that no time was mentioned in the writ in the register, he said, it pursued the words in the statute *W. 2. c. 31*. This case, if it should be allowed, would be of very ill consequence, upon this account: Suppose a dispute does arise at the trial, whether such a one shall be allowed to be a witness for me, and upon debate, the court admits him to be evidence, and after the trial is over, you will come and tender a bill of exceptions; because he was allowed evidence, I am hereby precluded from other evidence; whereas if you had mentioned it at the trial, I might have had evidence enough without him to have had a verdict, and so should not have insisted on him. If this practice be allowed, no man is safe, tho' he has a verdict.

Holt Ch. J. If evidence be not allowed, and you have thoughts of tendering a bill of exceptions, minutes must be taken of it at the trial, and there is no need that it should be put into form: 'Tis just like taking minutes of a special verdict; or demurring to evidence, the party must join in demurrer; but that is all in minutes. But * as to matter of form, that is done afterwards, * P. 177. and then when 'tis done, it has a retrospect, as if it was done at the trial; and in this case the judge is judge of the evidence, and when he has given his judgment, if you say nothing to it, nor except against it, you submit to his judgment; and if you come after the trial is over, it is too late, for his authority is determined; and as to the inconveniency of such practice, he said, suppose, after the trial is over some time, the counsel come and tender a bill of exceptions to the judge, he, it may be, has forgot the thing insisted upon at the trial; the counsel says, he remembers it, and so, if the judge does not remember it, an action shall be brought against him, and so the counsel's memory shall arraign the judge: He also said, when 'tis put in writing at the trial, it should be left with an officer of the court.

Powell Just. said, it must be prayed at the time of the trial, when the exception is over-ruled; and the cause may go on nevertheless, for only the substance of the exception is to be taken down at the trial, without regarding form. And that *scribat exceptionem* must be understood to be done at the trial. *Powis* and *Gould* being of the same opinion, with the chief justice, and

N n

Justice

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Justice *Powell*, they refused to sign the bill; the cause being tried before them at *Westminster*, at the sittings for *Middlesex*.

Thomson *versus* Pinchell.

Baron and
feme.
A feme exe-
cutrix must
join with her
husband.
1 Salk. 282.
Carth. 337.
S. C.

(2.) **A**N action by baron and feme against the defendant, for goods taken out of their possession; the wife was administratrix.

Mr. *Raymond* moved in arrest of judgment, because the goods having been in their possession, the wife should not be joined; and naming her executrix might have been left out of the case, and cited a case 10 *W.* 3. where the wife was executrix, and the defendant promised the husband, that if he would forbear, he would pay; and the wife was not joined in that case.

* P. 178.

* *Powell* J. In the case of baron and feme, 'tis certain the law does give the goods of the wife to the husband; but not when she is administratrix, because she has them *in auter droit*; and the husband here cannot bring an action on the judgment. Judgment for the plaintiff.

Queen *versus* Collins.

Order of bas-
tardy quash-
ed.
Ante 172.
(The Queen
v. Atkins);
and the au-
thorities there
cited.

(3.) **A**N order of two justices made upon *Collins*, the reputed father of a bastard-child; 'tis ordered, he shall pay 20d. a week, and the woman 4d. a week, for ten years. Mr. *Raymond* moved to quash it, because it should have been, as long as the child is likely to become chargeable, and not for a certain term of years; and cited *King v. James*, for it might be, that an estate might come to the child in the mean time, and it hinders the father from keeping it himself, if he has a mind to it. *Ergo* The order was quashed *per cur'*.

Queen *versus* The Inhabitants of Belzim St. Paul's.

12 Mod. 417.

(4.) **M**R. *Raymond* moved to quash an order of sessions, which was made to pay a surgeon's bill, who had cured a poor person; and urged, that the justices have no power to make such an order; for it was trying a *quantum meruit*.

Holt Ch. Just. If a surgeon cure a sick person that is poor, he must have his action against the overseers of the parish, and then the justices make an order to reimburse the overseers; but they cannot make such an order as this; for an action is the proper course. Therefore the order was quashed.

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* Willet *versus* Boscomb.

* P. 179.

(5.) **C**OVENANT brought by an heir for rent against the assignee, but does not set forth in his declaration, that his father was seised of any estate when he made the demise, only generally *quod cum dimisit*, &c. See *Cro. Car.* 571. 9 *H.* 7. 3. *b.* *Hutton* 55. were cited.

Where a title is to be shewn in the declaration.

Holt 568.

S. C.

2 Salk. 562.

3 Will. 65.

The defendant pleads *riens in arrear*. It was moved in arrest of judgment; that this declaration was ill, not shewing a title in his father.

Eyre for the plaintiff said, The defendant's pleading *riens in arrear* admits that the lessor had title, and so is 34 *H.* 6. 486. And if lessor brings debt for rent against the lessee, 'tis enough to say, *quod demisit*. And *Cro. Car.* 571. the heir counted, that the father was seised in tail, but does not shew when the estate began, yet 'twas held well. See *Hutt.* 55.

Holt Ch. J. The case in *Cro.* is well on issue joined, because it shews the father was seised; and so it would have been well on demurrer.

Powell Just. The case in *Hutton* of the avowry, where it did not appear when the rent was due, the verdict helped it; but not in this case, when he is son and heir, and does not set forth a title in his father; I fear 'tis a fatal fault. And 'twas adjourned.

Note; In *Michaelmas* term following, this case was again stirred; and then *Holt* Ch. Just. said, Surely this declaration is naught: The plea says, the rent was not in arrear, but the declaration and the verdict say, it was; and so the question is, whether this is not helped by the verdict.

Powell. If you entitle yourself to the reversion, you must shew that you are heir. But in an avowry, perhaps, you need not; because, in that case, if you had no title, he is a trespasser.

Holt Ch. Just. If a lessor brought debt, that, perhaps, might have been well, because the action there had been * upon the demise, and upon the privity of contract; but where the action is brought on the title, there the title must be shewn. And here the jury have found a title, where no title appears: It will be hard to help this case by the verdict.

* P. 180.

And 'twas again adjourned.

Bourdon

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Holt Ch. J.
absent.

Bourden versus Alloway.

Where case
lies, and
where tref-
pafs. 2.
Holt. 22.
S. C.

(6.) **M**R. *Eyres* moved in arrest of judgment, in an action on the case, for causing him to be arrested and carried to prison, without a cause.

The exception was, that this ought to have been trespass and not case. That a man cannot change the nature of the action, by laying it with a *per quod*.

Serj. *Wynne contra*. A justice of peace has power, by warrant, to arrest a man; and if he does it wrongfully, this action lies against him that maliciously causes this to be done.

Mr. *Bains* took the difference between an action of trespass and on the case: He said, he had heard from this court, that there is but little difference between the one and the other; and that almost all trespasses might be turned into actions on the case, at the plaintiff's election: But the true difference is this; *Trespass* is where there is an immediate injury; *Case*, where the injury is collateral.

2 Ld. Raym.
1402.
Str. 635.
2 Will. 313.

Mr. *Eyres* said, It does not appear, that he was arrested by any authority, and so a plain trespass. *Pengelly* said, Where the damage is immediate, yet the consequential damage thereon will not alter it from an action of trespass to an action on the case.

Powell Just. We must keep up the difference of actions; and 'twill be hard to maintain this. But if a man by being imprisoned should have a special damage, as forfeiting a recognizance; or that he could not appear at such a day, *per quod* he was damaged, &c. there it must be case; and *Powers* of the same opinion. * P. 181. *Gould* said, This is coupled * with special matter, and 'tis laid to be done maliciously. *Ergo* case lay. *Pengelly*. You may as well say, a man may maliciously assault and wound, and therefore case lies. *Adjournatur*.

Trespass is
local, but
trover tran-
sitory, &c.
(*) That is,
trespass *quare*
clausum fregit;
for trespass
and assault,
and trespass
for taking
goods, are
transitory ac-
tions.
Co. Lit. 282.
Cro. Car.
444.
Salk. 643.

Note: In another cause this term, *Powell* Just. said, There is a great difference between trespass and trover, as to the action being local, &c. For trespass (a) is local, but trover is transitory. Trover lies for trees, when they are cut down, because then they are chattels; but before they are cut down, they participate of the nature of the land, and trespass lies. But suppose, after a man has cut down a tree, if he carries it away, cannot he be indicted for felony? *Holt* Ch. Just. No, but trover lies for carrying it away; for 'tis a chattel, so soon as 'tis severed from the freehold; and for the severing thereof trespass lies.

The

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Abbot *against* Burton in C. B.

(7.) *A.* Seised in fee, in right of his wife, of lands which she had by descent, on the part of her mother. The husband and wife, by deed, covenant to levy a fine, which is thereby declared should be to the use of the conusees, and their heirs, to make them tenants to the *præcipe*, in order to suffer a common recovery; and afterwards such recovery was had accordingly, which, by the same deed, was declared should be to the use of the said *A.* for his life, and to his said wife for her life; and then to the first and every other son of their two bodies in tail male; remainder to the right heirs of the wife; with a *proviso* or power for the wife, during the coverture, to dispose of the remainder or reversion in fee, as she should think fit. *A.* and his wife die without issue, and without any disposition, made by the wife, of the said remainder or reversion, in pursuance of the said *proviso* or power. This case being found specially, the question was, Whether the lessor of the plaintiff, who claimed as heir to the wife, on the part of the mother, had a title to these lands: Or, whether the defendant, who * claimed the same lands as heir to the wife, on the part of the father, had a title to them. Wherein the court of C. B. unanimously gave judgment for the plaintiff; and the lord chief justice *Trevor* delivered the opinion of the said court, to this effect; *viz.*

In the arguing of this case, it has been insisted on for the defendant, That there is a difference between a use resulting by implication of law, and an use limited by express words; and *Hob.* 31. and *Dyer* have been cited for that purpose: But we are to consider, how this point stood before the statute of uses. Before that statute, the law considered the estate of the land, and the use of the land as two distinct things; and therefore before that statute, if a man had made a conveyance, either by deed of feoffment, or any other legal conveyance, he might therein, by express limitation, have declared the use of the land; or, if there were no express limitation, the law gave it back to him again; for he was not to pass away the pernancy of the profits, without some consideration or estoppel, by express limitation; so that a man might, at common law, have separated the use and the estate; and tho' the use and pernancy of the profits were neither created nor guided by the common law, yet the law took notice of them, and that *cestui que use* had a remedy by *subtænna*; so that this use was taken notice of, as distinct from the land, even at common law; then comes the stat. 27 H. 8. and what alteration that made is to be considered.

The nature and effect of common recoveries, as to the raising or altering of uses, &c.
2 Salk. 590.
S. C.
Quod vide, and the authorities there cited.

* P. 182.

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This statute executes the possession of the land, in the same plight and manner as the use was before; therefore as this conveyance is, this antient use, which results back, was not a new use; for it must be an old use, if it results back as not disposed of; and so much of the antient use still remains in him as was undisposed of. Now if the use would have gone this way before the statute, it will still go the same way since the statute. It is the same thing whether the antient use comes back by implication of law, or by limitation of the party; for that the construction of the law is founded on a supposal of the * intention of the party, and will convey and carry the use the same way as 'tis supposed the party would have done.

* P. 183.

Now if the law be so in the case of a resulting use, which arises by implication of law, what reason is there it should have a different construction where there is an express declaration of the party; especially since this declaration makes no alteration of the estate; and the other uses limited to *A.* and his wife, are only a new interest arising out of the conveyance only, because 'tis not so large an estate as the fee was before. But where the limitation is in fee it makes no alteration, because the one is as large an estate as the other. And it is still the same residue remaining in the wife, which she had not disposed of before, that is a part taken out of the whole, and of the same nature as the other was; and this appears so, not only from the reason of the thing, but there are other authorities also which seem to settle this point. 2 *Roll Rep.* 78. 1 *Co.* 100. 2 *Co.* 91. 1 *Inst.* 22. And it is all one, whether this antient use in fee was created by implication of law, or by express limitation of the party, if it be of the same estate. 3 *Lev. Godbolt and Freeston's case.* These authorities are law.

My brother, who argued for the defendant, endeavoured to difference this case from that in *Levinz*; and insisted on two things: *First*, That this was not an immediate conveyance, as a feoffment to a man in fee, but that here was a covenant to levy a fine, which is to be to the use of the conusees, and their heirs, with an intent to have a common recovery; and hereupon the chief objection is, that not only the legal estate but also the use passed to the conusees, both in law and in equity. So that when a recovery was suffered, this use in fee must arise out of the estate of the conusees. This carries the case a step further than that in *Levinz*, and 'tis fit I should give an answer to it: Now this opinion seems to me to be grounded on taking this common recovery in a wrong sense; for this fine and recovery may * be taken as two different distinct conveyances; and taking them as such, they are subject to this objection. But as they may be taken as two several, they may as well be taken as one single conveyance; and the deed, the fine, and the recovery, may well be taken as several parts of one and the same conveyance, which is the case

* P. 184.

A deed, a fine, and a recovery, but one conveyance.

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in question, and easily resolved: For where such a conveyance is made by deed, fine, and common recovery, tho' the estate does move from one to another, as conduits, yet the estate originally moves only from the conusor, and the estate is always in a manner in him; as if the estate be declared to one for life, remainder in tail, and no limitation of the use of the fee; the use shall result back to the conusor, and not go to the conusees or recoverors. And so if there be a limitation of the use of the fee, that use shall and must arise out of the estate of the conusor, and not out of the estate of the recoverors. *William's* case in the Queen's Bench is the same as this expressly. There was a power of revocation, and a covenant to levy a fine; and after that was done, it was questioned, whether the fine levied had not destroyed the power? But 'twas held, that the deed and the fine were but one conveyance, and not any destruction of that power, being contained as it were in one and the same deed, they both making but one conveyance, and from the very nature of the thing were to be esteemed only as several parts of one entire thing; and if the use be to conusees in fee, in this case it was not to give them an estate in the land, but in order to suffer a recovery; and their estates are determined by the recoveries being to them for that particular purpose only. But as I said, the estate moves originally from the conusor; what he has not parted with is still in him, and therefore so much thereof, as is not declared upon the recovery, shall be still to the old use; the nature of the common recovery being but as an instrument for raising of the use.

The second thing insisted on for the defendant was, That here is a power reserved to the wife, and this 'twas said had altered the estate, it being subjected and subservient * to a new power; * P. 185. for that now she might dispose of it in another manner than she could do, had it been only her old interest. *Answer.* I do not take this to be any new use, or to have altered the old estate: It is only a right or power of disposing of the inheritance, which otherwise she could not have done, this being only a new qualification of the old estate. Where an estate has a new *qualification* depending upon a new contingency, or where an estate is made liable to be disposed of in a new manner, such power, until it be executed, doth not alter the former use of the land. If she had pursued the power, no doubt all those uses had been new uses: Because in such case there had been a new estate created out of the old estate; and they would have come in as if their estate had been particularly limited. But before that power is executed she has only her antient inheritance, and the former estate still exists. If a man conveys an estate to the use of such person as he shall appoint by writing, in the presence of *A.* and *B.* Till he has executed this power, the use of the fee is the same as it was before; and subject to be determined only by the execution

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execution of such contingent power, which by such new provision does subsist upon and affect the land, and till that be executed, he is tenant in fee as he was before. So if a man makes an agreement to marry his son, and 'tis agreed that the use shall be to the man in fee, till the marriage takes effect; this is still the old use, but determinable upon a new contingency, which he hath subjected it to by this new conveyance; so that this power will not alter the estate at all; and till the power is executed in this case, she had her old estate in her, *i. e.* the residue of what she had not disposed of, which was the remainder in fee; which being derived to her *ex parte materna*, the plaintiff ought to have his judgment.

* P. 186.

* Mich. Term, 1708.

7 Annæ Reginae in B. R.

Bishop and another *versus* Eagle and another.

Post 263.
10 Mod. 22.
S. C.
but not S. P.
Lil. entr. 1.
Account as
receiver, not
saying by
whose hands,
ill.

LONDON. *scilicet* Josephus Bishop et Johannes Andrews, modo guardiani ecclesiæ parochialis parochiæ sancti Bartholomei parvi prope regale excambium London, queruntur de Johanne Eagle et Samuelo Franklyn, nuper guardianis ejusdem ecclesiæ parochialis, in custodiâ mareschalli mareschalliæ dominæ reginæ coram ipsâ reginâ existentibus, de placito quod reddant eisdem Josepho et Johanni Andrews, modo guardianis ecclesiæ parochialis prædictæ, rationabile computum de tempore, in quo ipsi prædicti Johannes Eagle et Samuelus Franklyn fuerunt guardiani ecclesiæ parochialis parochiæ prædictæ, et receptores denariorum, bonorum et catallorum, parochianorum dictæ ecclesiæ parochialis parochiæ sancti Bartholomei parvi prope regale excambium; pro eo videlicet, quod prædicti Johannes Eagle et Samuelus Franklyn, existentes guardiani ecclesiæ prædictæ, apud London prædictâ, in parochiâ prædictâ, in wardâ de Broadstreet, a festo Paschæ anno Domini 1706, usque ad

et

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et in festum Paschæ anno Domini 1708. infra idem tempus, virtute officii sui prædicti, habuerunt curam et administrationem bonorum et catallorum parochianorum ejusdem ecclesiæ parochialis, et recipiunt diversas summas denariorum hic postea mentionatas, ad usum parochianorum ecclesiæ prædictæ, eisdem Johanni Eagle et Samuelo Franklyn, per diversas personas hic postea mentionatas, solutas, ad computum inde reddendum; videlicet, per manus Willielmi Whitehead 21l. 6s. 6d. per manus Johannis Turner 68s. 6d. per manus magistri Evans 6l. 10s. per manus Johannis Andrews 7l. 16s. 8d. per manus PAROCHIANORUM parochiæ prædictæ 1000l. per manus Magistri Giesque 30l. per manus Magistri Pratt 14s. 2d. [et sic de multis aliis: *et donc le declaration procede come ensuißt*] ad rationabile computum inde reddendum iisdem parochianis dictæ ecclesiæ parochialis, cum inde requisiti essent: posteaq. scilicet quinto die Aprili anno Domini 1708. prædicti Johannes Eagle et Samuelus Franklyn, ab officio guardianorum prædicto, apud London prædictâ in parochiâ et wardâ prædictis, amoti fuissent; et prædicti Josephus Bishop et Johannes Andrews, modo querentes, postea scilicet eodem quinto die Aprili anno Domini ultimo supra dicto, apud London prædictâ in parochiâ et wardâ prædictis, in officium guardianorum prædictum, per prædictos parochianos ecclesiæ prædictæ, debito modo electi et constituti fuissent, et modo guardiani ecclesiæ prædictæ sunt: Prædicti tamen Johannes Eagle et Samuelus Franklyn (licet sæpius requisiti) computum suum, de denariis et bonis prædictis, eisdem Josepho et Johanni Andrews modo guardianis ecclesiæ prædictæ, nondum reddiderunt; sed illud eis reddere omnino contradixerunt, et adhuc contradicunt; ad damnum parochianorum ecclesiæ parochialis prædictæ 2000 l. et inde produciunt sectam, &c. (a)

Note the conclusion.

The defendants pleaded, that the plaintiffs were never elected church-wardens: but that fact being found against them, they moved in arrest of judgment. *Salkeld* said, The declaration supposes, that the defendant received several sums of money, viz. by the several persons herein after-mentioned, the several sums herein after-mentioned. That an action for an account ought to be a precise charge. 43 E. 3. 21. and 23. b. That account ought to be certain; and if part of the declaration be uncertain, judgment *Quod computet* shall not be as to that, but only as to what is certain. *Secondly*, They ought to be charged as receivers, and not as bailiffs. 2 Lev. 126. *Econtra*, The plaintiff is the present church-warden; and the defendant is the last church-warden; and that he is well charged as receiver; and should he have been charged as bailiff, they ought to have pleaded it. 2 Lev. 126. 1 Sid. 39. Then 'twas said, They ought not to be charged

(a) This declaration is now first published, from Mr. Lutwyche's MS.

per manus parochianor', but by particular names, for the greater certainty.

Mr. Eyres (*cont.*) By the defendant's pleading, that he was not church-warden, he has admitted the charge in the declaration. 3 Keble 425. 2 Lev. 126. 1 Roll Abr. 391. Co. Lit. 172.

* P. 187.

* Dee, Common Serj. A receiver need not be charged by whose hands he received, &c. Dyer 183. Cro. Eliz. 749. And to avoid prolixity in the pleadings, the defendant ought to have demurred. 1 Roll Rep. 391. 2 Lev. 126.

Ckeshire, Serj. for arresting the judgment, urged, If the nature of the action requires, that particulars should be shewn, 'tis out of the reason of the cases about prolixity of pleading.

Powell Justice. Actions of account between merchants need not set out the particulars; *quasi dicat*, but otherwise here. A church-warden must be charged as receiver; and the receipt is traversable, and you must say by whose hands, and go to the country; or else, if you do not say by whose hands, he may wage his law; because it shall be presumed to be from the hands of the plaintiff himself, and therefore in such a case he may wage his law. *Per manus parochianor'* is very general, and he thought they ought to have set out the particular receipts of the particular persons: But if that case in *Levinz* be as 'tis cited, then *per manus parochianorum* will be as if they had not set out by whose hands at all. But the question is, whether, by their taking issue upon a collateral plea, they do not come too late to except against the incertainty of the declaration. As it was in that case in *Levinz*.

Account abated in part, and judgment *pro residue*.

Holt Ch. J. They come now upon the *posse*'s being returned, before judgment *quod computet*; And *quoad* that part of the declaration which charges the receipt *per manus parochianor'*, we may well abate it, for 'tis imperfectly charged and uncertain, and give judgment *quod computet* as to the rest. And the court abated it, as to the uncertain charge for the 1000*l.* and said, if judgment *quod computet* had not been given, then he would lose the benefit of costs upon the plea of the collateral matter. Q. Holt also said, *Ley gager* was originally introduced for the benefit of the plaintiff; and that 'twas supposed the defendant would, upon the sacredness of his oath, discover more than the plaintiff could charge or prove; and therefore, unless the defendant in such case would purge himself by oath, the plaintiff should recover.

Same

Mich. Term 7 Ann.

Same Case continued, (a)

ACCOUNT brought by plaintiffs, as church-wardens of the parish of St. Bartholomew, for several sums received by defendants, as church-wardens of the same parish. And among other *Items*, charged in the declaration, there were the following; *per manus parochianorum parochiae praedictae 1000l. per manus magistri Giesque 30l. per manus magistri Clauds 20l.* Then the declaration further goes on and charges, that the defendants, *de bonis parochianorum parochialis ecclesiae praedictae, per manus Willielmi Whitehead, recipiunt, duo superpellicia, duos sericos pulvinos, (anglicè two velvet cushions) quatuor libros, anglicè vocati common prayer-books, una serica mappa, (anglicè a velvet communion table-cloth) ad rationabile computum inde reddendum;* but alledges no value.

11 Mod. 186.
S. C.
10 Mod. 222.

Defendants plead that the plaintiffs were never elected church-wardens; and the jury, on the issue, find they were elected church-wardens. After that, there is a judgment given by the court, that, as to the 1000l. said to be received *per manus parochianorum*, the count be abated, *et quod* the defendants *eant inde sine die*; and as to the rest of the money, and the goods mentioned in the declaration, that the defendants account.

Accordingly auditors were assigned; and after that, *iidem auditores protulerunt hic in curiâ computum praedictum, de et super premissis, cujus quidem tenor sequitur in hæc verba (js); Computus Johannis Eagle & Dan. Franklyn, quem petunt allocari, & exinde onerari.*

In this account, as to the 30l. received by the hands of *Giesque*, the defendants plead, that it was paid by mistake, there being no more due to them than 3l. 14s. 6d. *Per quod* they restored and paid back the overplus, to the said *Giesque*. The same answer they give to the 20l. received by them of *Clauds*: They say it was paid them by mistake; and that they, finding that mistake, repaid it to him.

And as to the goods and chattels, they say that, as to the surplice, they were robbed of it; and as to the rest, they remain in their hands: And that they are of the value of 20s. which the defendants offer to allow the plaintiffs; and pray that, *that* being deducted, they may be allowed the surpluse of their account, and that they may be discharged.

The plaintiffs traverse the payment of every particular in the account, (on which issues were taken, and found for the defendants) except the payment to *Giesque* and *Clauds*; and as to them they demur: and they also demur on the defendants prayer of surpluse; Upon which, the defendants join in demurrer.

As to the goods and chattels, the plaintiffs take issue; *viz.* as to the surplice, that the defendants were *not* robbed of it; and on that issue is joined; and as to the other goods, they plead they were

(a) This continuation, of the foregoing case, is now first published from Mr. Lutwyche's MS.

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Argument
for the de-
fendants.

ultra valorem 20s. Et hoc petunt quod inquiretur per patriam: And upon this the defendants demur, and the plaintiffs join in demurrer.

Mr. Lutwyche, for the defendants, argued as follows:

The first question is, whether there be any account before the court. The words are, *Computus Johan. Eagle & Dan. Franklyn, cujus quidem tenor sequitur in hæc verba.*

Where the court are to judge of an original, they will not proceed upon a *tenor* or copy. A *tenor* is not the original. And therefore where a *certiorari* was directed to justices, to certify an order; and they certified that they made an order, *cujus quidem tenor sequitur in hæc verba:* The court held there was no order before the court. *St. Mary in le Dewises. Pasc. 1702.*

This court cannot proceed judicially on any copy or *tenor*; but must have the very original itself, unless where the record comes here by *mittimus* out of Chancery. 39 H. 6. 4. a.

As to the demurrers, we think they are both for us; and hope the same success as on the issues.

As to the plaintiffs demurrer to the defendants plea; the substance of the plea is, that the defendants received the money, but it was paid by mistake, not being due; whereupon the defendants restored it to the parties.

Now if the defendants had not paid back this money, the plaintiffs, who are the succeeding church-wardens, might have maintained an action of account against them; because there was a receipt of the money, and they received it expressly for the use of the parish, as being the church-wardens: and perhaps *Giesque* might acquiesce under the mistake, or never demand it; and then the benefit ought to be to the parish. On the other hand, suppose the defendants had paid the money over to the plaintiffs, as succeeding church-wardens; in such case, *Giesque* and *Clauds* might have brought their account for this money; because the defendants are a continuance of the same corporation, so that the privity of the first receipt continued: And account lies for money paid by mistake. 3 Cro. 614.

To consider this in other instances, If *A.* pay money to *B.* to pay to *C.* either *A.* or *C.* may have an account for this money. *A.* paid the money; Therefore *he* may have an account. On the other hand, *C.* may bring a writ of account; because it was paid expressly to be paid to him. 1 Ro. Abr. Yet in this case the payment of the money to *C.* was countermandable; and if it be actually countermanded, 'tis a good discharge.

2dly, We could not plead this in bar of the action of account, and therefore must be allowed to plead it before the auditors.

The case of 30 H. 6. 5. b. is a full authority. Account against the defendant as receiver. Defendant pleads in bar, he received the money to pay to *J. S.* for a patent, which *J. S.* procured for the plaintiff; and that he paid it accordingly: *absq. hoc.* that he received it *pur account render.* Held, that whenever a man admits a receipt, he can't traverse his being a receiver *pur account render*; for he ought to account, if he had not paid it; and if he had paid it,

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it is a good account. But where the plea admits no receipt, as if one plead the plaintiff gave it him; *there* he may traverse the receipt *pur account rend.r.*

So is 28 H. 6. 7. a. 9. a. Account for 100*l.* received by such a one: Defendant pleads that he afterwards offered it to the plaintiff, and he bid him keep it, in satisfaction of so much money due to the defendant from himself, which defendant agreed to, and retained it. Held no plea, and judgment *quod computet.*

So Dyer 196. pl. 43. (a notable case). If *A.* owes money to *J. S.* and pay it to *B.* to deliver to *J. S.* and he deliver it accordingly; and the bailor bring account, to which the defendant pleads *ne unques son receiver*; the defendant can't give in evidence this special matter; for he was his receiver, and accountable conditionally; *viz.* if he did not deliver it over. So in this case.

But see 1 Rol. Abr. 126. f. 22. where it appears, that this should be pleaded specially in bar of the action; tho' it cannot be given in evidence under the general issue of *ne unques son receiver*. And see Cro. El. 830. S. P.

Action of account differs from debt or detinue, or any other action.

In debt, the action consists of two things, both material; *viz.* the *debet*, which is the contract, and the *detinet*, which is the non-payment. These are the two pillars of this action, and both equally material; and therefore the defendant may counter-plead either of them, in bar of the action itself; that is to say, he may either *deny* the debt, or *confess* the debt, and plead payment. And if it be an action of debt for money received *per manus J. S.* the defendant may wage his law; because *J. S.* may not be privy to the payment, tho' he was to the receipt.

In account 'tis otherwise. The receipt is the only pillar of the action, and not the *non reddidit* or not accounting; therefore you may counter-plead the receipt in bar of the action; but if you admit the receipt, the action is admitted, and you can't plead a discharge or payment. And if it be account for 10*l.* received *per manus J. S.* the defendant may not wage his law; because there is no other material point but the receipt, and of that there is a witness.

The action need not be founded in property, as trover; a bailment is sufficient. The *denarii ipsius* is not traversable. If the plaintiff was only possessed, 'tis enough for him to maintain his action.

The action is always pending before the court; but the account before the *auditors*, who are ministerial to the court, upon the judgment *quod computet.* Therefore whatever goes to the action, must be pleaded accordingly to the court: But if any matter goes in discharge or excuse; as robbed, paid, &c. it must be pleaded before the *auditors* (a).

Obj.

(a) The rules of pleading in account, as settled by lord ch. just. *Wilmot*, in the case of *Gedfrey v. Saunders*, (3 *Wils.* 73.) tho' they are inaccurately stated by the reporter, are as follows:

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Obj. The property is in *auter*.

Br. Abr. tit.
account, 14.
18. 32.

Ans. The action is not founded in property; the *denarii ipsius* is not traversable. 43 E. 3. 41. b. A writ of account for three ton of wine, delivered by the plaintiff to the defendant to sell; the defendant pleaded the wine was the wine of the plaintiff *et auter*; *absque hoc* that the property was in the plaintiff only. *Non allocatur*: For it is no matter whose wines they were; the defendant is accountable to the plaintiff, if he bailed them.

Nothing more is admitted, but such a receipt of the money, as that we are accountable.

The next is our demurrer to the plaintiffs replication.

Your lordship may observe, that the declaration charges the defendant for several goods and chattels, which came to his hands *ad computum inde reddendum*, but alledges no value nor price. The defendant confesses them in his hands; says they are worth 20s. which he offers to allow the plaintiff, and thereupon prays this may be deducted; and likewise prays his surplusage may be allowed him. The plaintiff comes and replies the goods are *ultra valorem* of 20s. *scilicet* of 300l. *Et hoc petunt quod inquiretur per patriam*. To this the defendant demurs.

The first question is, whether this omission of their declaration was a defect of substance; for then the pleading following will not cure it.

2 Cro. 129. *Trover* for a horse, no price laid; and cured by verdict.

2 Ro. Rep. 447. *In detinue* the value is material; because the judgment is conditional.

3 Cro. 806. The judgment in account must be *quod recuperet valorem*.

2 Cro. 129. is in point; namely, that it is substance upon demurrer.

But see the
Reg. fo. 37.
and *quare*
whether the
omission is not
helped after
verdict, by
stat. 18 Eliz.

But if it be not material, how can the plaintiff maintain this replication? For his replication and issue are not only to make it material, but to make a precise sum material. The issue, as they offer it, must be against the defendant, if the goods be of more than the exact value of 20s.

1. That whatever matter MAY be pleaded in bar, MUST be so pleaded; and that such matter cannot afterwards be pleaded before auditors. This rule was designed, to avoid useless trouble and expence; for else the defendant might lie by, and plead before auditors that which he might have pleaded in bar. *Style* 411.

2. If the party be once chargeable and accountable, he cannot plead in bar, but must plead before auditors. This rule, however, admits of several exceptions, in the cases of a release and *plene computavit*; to which may be added the case of an arbitrament: And the reason of these exceptions is, that they are total extinctions of the right of action, which the court are to judge of; and therefore they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. 1 Brownl. 24, 25. Heil. 114. Cro. Jac. 116.

3. Nothing shall be pleaded before auditors, contrary to what has been pleaded before, and which has been found by verdict; for that would introduce either contrary verdicts, or two similar verdicts on the same point, which is equally absurd. *Vide* 3 Wils. 113, 114.

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The substance of our plea is, that we have the goods in our hands; and therefore you should have prayed a writ of inquiry; for this our suggestion, of the value, was an immaterial allegation, that signified nothing but to let in the plaintiff, to pray the value might be enquired.

Suppose a verdict against the defendants, the jury finding the value above 20*s.* what judgment must be given? Surely not for 300*l.*; but the plaintiffs must have an inquest of office to inquire the value.

Two things more the plaintiff demurs on; first, that the defendants pray a discount; and secondly, an allowance of surplufage.

I take it they are wrong in both these. And this depends on whether the defendants shall be looked upon as bailiffs, or merely as receivers.

Where one is charged as receiver, 'tis only of certain sums *per account render*. But where one is charged as receiver *curam habens & administration*, in that case he is always charged as bailiff.

A receiver has not administration; he is not to lay out and receive: *Aliter* of a bailiff. 28 *H. 6.* 5.

Again, why is not the defendant to be allowed his surplufage? The auditors are judges of record. As the *action* is before the court, so the *account* is before them. 2 *Inst.* 380. *Westm.* 2. *chap.* 11. The auditors are to settle the account *omnibus allocatis & allocandis*; and if the lord be found in surplufage, 'tis within their authority.

1 *Ro. Rep.* 87. Earl of *Suffolk's* case. *Account* against *Lloyd*, son receiver of 204*l.* Before auditors defendant shews several disbursements to 204*l.* and 600*l.* more, and prays allowance of this surplufage. Ruled that it could not be in case of a receiver, but might be in case of a bailiff. See also *Palm.* 512. 1 *Ro. Abr.* 599.

On the first demurrer, to the defendant's plea, *Powell* and *Parker* Ch. J. differed in opinion. The former was of opinion with the plaintiff; for tho' he allowed, that the matter of the plea could not be given in evidence, under the general issue of *ne unques son receiver*; yet he held, that the defendant might have pleaded this matter specially, in bar of the action.

Parker Ch. Just. was of a different opinion, which he delivered as follows.

Admitting this to be a good plea before auditors, it will be necessary for the defendants to plead it as honest men; and to shew, not only that the money was paid them by mistake, but that they actually repaid it. Whereas, by taking it the other way, to be a good plea in bar, it will not be necessary for them to shew a repayment, but only that the money did not belong to the parish; for the idea of such plea is, that a receipt, by mistake, is as no receipt at all. This then inclines me to support the plea

plea as far as possible. And besides, if the defendants had paid this money to the parish, before they came to a knowledge of the mistake, the parish would have been liable to the repayment of it: The repayment therefore by the defendants was an act in discharge of the parish, and consequently the proper subject of a plea before auditors.

On the other demurrer to the plaintiffs replication, the court were clear in opinion, with the defendant, that the prayer of surplusage was right; for churchwardens are not merely receivers; they are in all respects to be considered as bailiffs.

The rule, that a bailiff shall be allowed his expences and surplusage, but not a receiver, only holds in respect of a mere receiver; and as to him, the reason is evident. But where the nature of the thing implies, that a receiver must be put to trouble and expence, the rule is not applicable.

* P. 188.

* The Queen and The Mayor, &c. of Hertford.

Construction
of their char-
ter, as to their
power of ma-
king foreign-
ers freemen.
2 Salk. 701.
6 Mod. 39.
S. C.
2 Ld. Raym.
766. S. C.

(2.) **S**IR Simon Harcourt argued this case thus: There are three charges in this information. *First*, For taking men *non in communitatem burghi*. *Secondly*, For taking men not of the town. *Thirdly*, For making them free of the borough. The charter of king Philip and queen Mary says generally, That they make *omnes homines quoscunq;* but no restrictive words are therein, and so it gives no more than the law gives. 10 Co. King James I.'s charter says, not exceeding three. King Charles II. grants them to use, exercise, &c. in all and every such manner as theretofore they had done; and this seems to restore queen Mary's charter, and to enlarge king James's; so that this issue about acting under king James's charter is immaterial.

Mr. Lutwiche. The charter of king Charles II. has, by way of new grant, given them every privilege they had before. The question was, whether there being no restrictive words in queen Mary's charter, *If thereby they might, by law, have taken in whom they had pleased, into their corporation, from any part of the kingdom, when the queen incorporated the men of such a place only.* Queen Mary's charter grants them a power to make *omnes homines quoscunq;* tenants and inhabitants; and the charter Jac. I. restrains them to three. King Charles II. grants them to exercise, use and enjoy all privileges they, at any time before, ever used. 'Tis objected, that the issue being upon king James's charter, was immaterial; queen Mary's charter being restored by the general grant of king Charles II. Another objection is, that in the *distringas* 'tis not laid in what cause. *Rast. Ent.* 330. 125. or 225.

Solicitor-

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Solicitor-general. The affirmative grant imports a restriction in the essential part of the corporation, and not to be compared to the cases of by-laws, &c. For they are generally incident to all corporations; but this is particular.

* *Powell* Just. The question is, Whether this corporation can make persons free thereof, which live out of the town? *Holt* Ch. Just. As this corporation is constituted, all persons that are inhabitants are of the corporation as such; and he said they were freemen; but *Powell* thought that would be of dangerous consequence, that by their mere coming and inhabiting there, they should gain a freedom. But doubtless by the antient common law, a residence for a year and a day, within any free borough, made the party free of that borough: And tho' he was a villein before, he thenceforward became a freeman. *Note*; This case was ordered to stand in the paper to be solemnly argued. * P. 189.

Ford *versus* Offulston.

(3.) **A** DEVISE was to a man with several remainders; and a remainder over to the heirs male of the devisor. The question was, If a collateral heir male could take by this devise? And the court were clear, he could not; and that the testator, not having an heir male of his body at the time of his death, they held it a void limitation; and said, in the king's case of a grant to the heir male, 'tis void; but in that of a common person, 'tis a fee, and the word *male* is idle. For heirs males, &c. in a will are always intended, of the body, and implies an estate-tail. *Q*

Devise to heirs-male void, if none of the body living; for it implies a tail. *Q*. See the case of *Pybus v. Mitford*, 1 Vent. 372, &c.

Queen *versus* Prew.

(4.) **S**IR *Peter King* moved to quash an indictment against a serge-maker, for dying his own serges, he not having served as an apprentice to the dying trade; for that it was not said in the indictment, that he was a common dyer, and that he might lawfully dye his own wool; and he said, it was so adjudged in a case, where, because * it was not laid a common * P. 190. baker, 'twas held ill; for any man may bake for himself, and so he may dye, &c. But the court held the indictment well enough, being not like the case of a baker; for many people bake their own bread, but a dyer is a separate trade. And *Holt* cited a case, where a comb-maker was indicted for exercising the trade of a horn-presser, tho' he used horn for making his combs; and 'twas adjudged it lay, because 'twas a distinct trade.

Walker *versus* Atwood.

A bill of exchange has no day mentioned when it should be paid; when it is accepted, a *pari* upon it must be upon the custom, tho' the promise be to pay at a future time, and not on the new agreement.

Cun. Law of Bills, &c. 87.

(5) **A**N action was brought on a bill of exchange: The bill was drawn the 8th of April, 1707, upon *Atwood*, to pay 15*l.* to *Godfrey*; the bill being shewn to *Atwood*, he promises to pay it the 18th of April, 1707. Afterwards this bill was assigned to *Walker*, who brings this action, and declares on the custom, &c. Upon a demurrer to the declaration, Mr. *Salkeld* for the defendant said, That the bill being to pay a sum of money, and no day said when it should be paid, it must be paid on sight; *ergo*, this promise to pay two or three months after, *viz.* the 8th of September, is a new agreement, and consequently the action must be founded on the new agreement, and not upon the custom of merchants.

Powell Just. The custom of merchants is by the acceptance, and a promise to pay at such a time is good, and he is bound by the custom of merchants, by acceptance, to pay at the time appointed, and therefore the plaintiff has declared well on the custom of merchants; and if it should not bind him on the custom, it would not at all, because no *indeb' assump'* lies on the acceptance. Judgment was given for the plaintiff, *nisi*: By *Powell*, *Powis*, and *Gould*. *Holt* Ch. Just. absent.

* P. 191.

* Anonymous.

One taken on an *excom' capiendo* discharged, he being listed a soldier according to the act.

Post 235, 252. and the authorities there cited.

(6.) **A**MAN being excommunicated for not payment of costs, in a suit for tithes in *cur'* Christian. Mr. *Lutwyche* moved to discharge him, he being in custody upon an *excom' capiendo*, because he was listed a soldier according to the act of parliament, which says, *If any person being in custody upon any process, &c.*

The court did not discharge him upon this motion; but after, it being moved again, *Holt* Ch. Just. said, Since the judges of *C. B.* are of opinion, that a man in execution shall be discharged, being listed as a soldier, that a man in execution on an *excom' capiendo* is within the same reason; and therefore by the court he was discharged. But he said, he never was of opinion, that this act should extend farther than mean process, and not to persons in execution.

Wells

Mich. Term 7 Ann.

Wells *versus* Ferguson.

(7.) **D**EBT for 15*l.* brought by *Alex. Ferguson* against *T. Wells*,
on a bond dated the 26th of *October*, 1705. Upon
oyer of the condition, it was set forth; Whereas *John Wells*,
the son of the said *T. W.* the plaintiff, did put himself appren-
tice to the said *Alexander Ferguson* for seven years; and whereas
the said *John Wells* is desirous to be acquitted of the said ap-
prenticeship, and to have his said indentures delivered up; and
whereas the said *Thomas Wells* and *Alex. Ferguson* are agreed, that
for and in consideration of the delivery up of the said indentures,
and acquitting the said *John Wells* of his apprenticeship, he the
said *Thomas Wells* has paid unto the said *Alexander Ferguson* two
guineas in gold; and has agreed to pay off or otherwise indem-
nify the said *Alexander Ferguson*, of and from the payment of a
certain note, given by the said *Alexander Ferguson* to one *Charles*
London, the former master of the said *John Wells*, for * payment
of 4*l.* to *Charles London*, &c. Now the condition of this obli-
gation is such, that if the said *Thomas Wells*, his executors and
administrators, shall and do, before any suit or action brought,
&c. by *Charles London*, his executors and administrators, &c. on
or by reason of the said note against the said *Alexander Ferguson*,
his executors, &c. cause or procure the said note to be delivered
up to the said *Alexander Ferguson*, his executors, administrators,
&c. to be cancelled, or otherwise that the said *Alexander Fer-*
guson be sued and compelled to pay the said sum of 4*l.* to the
said *Charles London*, his executors, &c. and that he the said *Tho-*
mas Wells, his executors, &c. do not then immediately repay
such sum of 4*l.* to *Alexander Ferguson*, his executors, &c. with
all costs, charges and satisfaction of all damages sustained by
reason thereof, or the prosecution thereupon, he or they having
notice left of such prosecution; then the obligation to be void
and of none effect, or else to stand, remain and be in full force
and virtue.

After verdict, it was moved in arrest of judgment: And Mr. *Raymond* for the defendant said, the plaintiff had no cause of ac-
tion; for the condition being in the disjunctive, the defendant
may perform which part he will, and here he has performed the
latter part, *viz.* he has not repaid the money, and the condition
of an obligation shall not be construed contrary to the express
words, tho' the parties intend otherwise; and to maintain this,
he cited *Plowd.* 30. *Allen* 9. *Stiles* 12. *Ingledeu v. Crisp.*
Debt on a bond penal reciting, that the plaintiff had agreed to
sell the defendant so many stacks of wood, the defendant cove-
nanted to pay for every 100 stacks 35*l.* An action was brought

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for 310*l.* for so many 150 stacks; demurrer; and judgment for the plaintiff; because the agreement being for every hundred, and not said *secundum ratam*, he could not recover. 1 *Lev.* 77. *Vernon v. Alsop* *. Debt on a bond, conditioned to pay 7*l.* by 2*s.* per week, till the - *l.* is paid; and if he fail of payment of the 2*s.* at any of the days it ought to be paid, the obligation to be void; adjudged the condition shall be taken distributively. 1

* P. 193. *Sid.* 105. 1 *Keb.* 306, 416, 451. * But for a case in point he cited 34 *H.* 6. 10. where *Littleton's* opinion was, that if a man bind himself in an obligation of 100*l.* where the condition is, that if the defendant does not pay the obligee 10*l.* that the obligation shall be void, this shall avoid the obligation, tho' the intent was otherwise; because the words of the condition must be observed.

Mr. *Williams* for the plaintiff said, That if the condition be not, that he shall pay off that which the bond is given to secure, the condition is inconsistent. Besides, 'tis recited in the condition of the bond, that 'tis agreed the defendant shall pay off the note or indemnify. Therefore 'tis plain 'tis a repugnant condition, and the rule is, that when the condition is repugnant and insensible, the obligation is single; to prove which he cited 2 *Saund.* 78. 1 *Mod.* 35. 1 *Lev.* 77. *Raym.* 68. 1 *Sid.* 105.

Holt Ch. Just. The condition is, that if he delivers up the note before it be put in suit, or if it be put in suit, and the plaintiff forced to pay, and then if he does not repay the money, the obligation to be void, &c. this is a contradiction and repugnancy.

Powell. The case in the year-book is as Mr. *Raymond* has put it; but that differs much from this, for there was no repugnancy. But here the recital in the former part of the condition is repugnant to the latter part. Upon this argument it was adjourned with a *curia advisare vult* till another day in this term; and then the court gave judgment for the plaintiff.

And *Holt Ch. Just.* said, the condition was repugnant; and no difference between this and *Vernon* and *Alsop's* case, 1 *Lev.* 77. And he said the case in 34 *H.* 6. 10. was not law.

Bendish versus Lindsey.

* P. 194.

Words spoken of a candidate at an election of parliament-men.
3 *Lev.* 30.
3 *Mod.* 26.
S. C. in error.
2 *Salk.* 695.

(8.) **T**HE plaintiff declared, that he being *bonus, verus, honestus, probus & fidel' subdit' & ligeus Annæ reginæ, &c.* and having good interest among the burgesses of the borough of Cambridge, and standing as a * candidate for that borough, the defendant *existens burgenfis ejusdem burgi Cantabr', & habens suffragium in electione & retorno burgenfium parliament' pro burgo præd' in parliament' deservitur', præmissor' non ignarus, sed machinans*

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machinans & malitiose intendens ipsum the plaintiff *minus rite prægravare, &c.* and to hinder him from being chosen, holding in his hands three guineas, in the presence of many people, burgesses of the said borough of Cambridge, *tunc & ibidem palam, publice falsè & malitiose dixit asseruit & præpalavit de eodem* the plaintiff, *hæc falsa, ficta, malitiosa & opprobiosa verba* Anglicana sequentia, viz. These guineas, (*innuendo præd' has pecias auri cuneat' vocat' guineas;*) and two more (*innuendo duas al' pecias auri cuneat' vocat' guineas,* and two half guineas) are Mr. Bendish's, (*eundem* the plaintiff *innuendo*) his money, and were given me to vote for him, and he has bought (*innuendo suffragium ipsius* the defendant,) and he shall have it; upon issue joined, and a trial and verdict for the plaintiff, it was moved in arrest of judgment, viz. Exceptions were taken by Mr. Thompson for the defendant, 1st, That these words are not actionable; for no words are actionable except they subject the plaintiff to a temporal punishment, or a special damage, and here is nothing spoken that will subject the plaintiff to an indictment on the statute. And *Co.* 145. says, Bribery is when one takes a fee in a judicial place. His second objection was, that the words are insensible, for when the plaintiff has given the money to the defendant, it cannot be the plaintiff's money. Third objection, that it is not aver'd through the whole pleading, that the plaintiff did not give the money, &c. Fourth objection was, that the sheriff *præceptum suum misisset majori præd' burgi Cantabr' ad elegend' & returnand' duos burgenses ejusdem burgi ad essend' & deservierend' pro burgo præd' in parlamento illo, &c.* and it should be to the mayor and burgesses; and therefore the speaking these words is no offence, in case of such an election.

Holt Ch. J. It need not be averred that the plaintiff did not give the money to the defendant to vote for him, for 'tis said, *hæc falsa, ficta, malitiosa verba*, which * is well enough; and as the precept being directed to the mayor to chuse, and not said to cause to be chosen, he said, 'twas well enough after verdict; because it must be proved at the trial that the election was made by the burgesses; and as to the merits of the cause, he was clear of opinion that the action lay; and judgment was given for the plaintiff, *per Holt Ch. J. Powis and Gould. Powell absent.* * P. 195.

Queen versus Shaftow.

(9.) **I**NDICTMENT for saying you are an informing rogue, an informing rascal, and an informing villain, knowing him to be a justice of the peace.

Mr. Lutwyche moved to quash this indictment; and *per cur'* it was quashed *nisi*, the end of the term; for words said of a justice

S f

Indictment
for words said
of a justice of
the peace.
2 Salk. 695.
Str. 420.
1158.
Of Ante 166.

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of peace are not indictable, according to the late resolutions between *Queen* and *Wrightson*; *sed quære*. For this point is very unsettled, it depending much on what is called *discretio curiæ*.

Bennet *versus* King.

Prohibition
for scandal in
London by
implication.
Str. 471.
Vicars *v.*
Worth.
Ibid. 545. but
see p. 117.

(10.) *A.* Said to *B.* that *she made her husband a cuckold*; *B.* libelled against *A.* in the spiritual court; and Mr. *Soutbouse* moved upon suggestion that the words were spoken in *London*; and tho' 'tis not calling her *whore* directly, yet 'tis calling her so by implication.

Holt Ch. J. If the custom of *London* extends to punish a woman that makes her husband a cuckold, then a prohibition may be granted; for the foundation to grant a prohibition, for calling a woman *whore* in *London*, is, because they by custom punish whores there by carting them; and an action lies there for calling a woman *whore*. And afterwards at another day this term they granted a prohibition, because these words are actionable in *London*.

* P. 196.

* Tate and Whiting.

Promise to
the intestate,
and a promise
to the admin-
istrator join-
ed, *remit*
damna to one
helps it.
Post 256.
Hob. 249.
1 Brownl.
235.

(11.) *ASSUMPSIT* upon several promises brought by an administrator *cum testamento annexo*; two whereof were made to the intestate, and the third laid thus: Whereas the defendant *Tate* was indebted to the intestate, and letters of administration granted to the plaintiff: He the defendant, in consideration that the plaintiff would forbear to sue, promised to pay. This was in error out of *C. B.*

Mr. *Whitacre* for the plaintiff in error said, that these promises could not be joined; for that the last promise is made to the administrator himself; and 'tis a question, whether the *remittit damna*, which was entered after verdict, will help it; and cited *Sbawer* 366.

Holt Ch. J. said, he would not allow that book as an authority. But yet he admitted, that these promises could not be joined, and upon a demurrer it had been ill; but now the *remittit damna* has cured it. For if baron and feme join in an action of battery, for the battery of both, if the defendant be found not guilty as to the husband, and guilty *quoad* the wife, and a *remittit damna* be entered as to the husband, 'tis good, tho' *prima facie* they could not join; and so in this case. Judgment was affirmed.

Bushel

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Bushele versus Burland.

(12.) **I**N ejectment on a special verdict, the case in short was, Holt 733. S. C.
A. and B. his wife, levied a fine; and four years after they make a deed to declare the uses, in which there are these words, *All and every fine or fines levied, or to be levied, shall be to the uses of the deed.*

This case was argued in term *Paschæ 7 Annæ Reginae* by Serj. Pratt and Serj. Hooper, and adjourned to this term.

* Serjeant Pratt argued, that the fine was good; for though * P. 197.
the deed was long after, and these words, (*All and every fine or fines, levied or to be levied, shall be, &c.*) yet the jury find that it related to the fine before levied, and insisted on *Dowman's* case, in 9 Co.

Serjeant Hooper cont. argued, That *Dowman's* case was before the statute of frauds and perjuries, when declarations of uses might be by parol; and made several differences between this and *Dowman's* case; and if this was good, where was the freehold all the while between the levying of the fine, and the execution of the deed; and besides, by the words of the deed, it is plain it related to a subsequent fine; and he said, that the verdict does not signify any thing here; for if the jury find what is not law, it does not avail; as suppose they had found the declaration of uses had been by parol.

Holt Ch. J. and the court said, that the first fine would be to no use, if this deed does not relate to it; and *Beckwith's* case in 2 Co. says, it shall be good, if the wife does not declare the contrary: If a fine be levied by husband and wife in vacation, and they make a deed of uses of a fine levied in *Trin.* term, (as in judgment of law it is) 'tis good, tho' since the statute of frauds and perjuries; and there is the same objection as to the freehold being in abeyance, and the time does not make any alteration.

Or if a man levy a fine, and the deed is lost, and four years after he make another deed, the fine is good.

The stat. of frauds and perjuries is out of the case; for it is thereby declared that all subsequent deeds shall be as they were before. *Sed adjournatur.*

Langthorn versus Taylor.

(13.) **E**RROR on a judgment in C. B. In debt upon the return of an *elegit*. The declaration was, that *M. Clayton* by indenture demised a house, and certain goods mentioned in a schedule, for 21 years, if * certain persons should so long live.
Post 262.
1 Ld. Raym. 244.
1 Salk. 319.
Carth. 404.
5 Mod. 338.
8 Mod. 108.
* P. 198.

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live. That the plaintiff recovered a debt of 300*l.* against her, and execution thereon.

Raymond excepted, That the execution was taken out pending a writ of error; and that all the precedents are, That it ought to appear to be with an *affirmetur*. 1 *Sand.* 182, 233. 2 *Sand.* 233, and 317. And that it not appearing here that the judgment was affirmed, 'tis erroneous.

Holt Ch. J. It must either be a *non prof.* or an affirmance. You have indeed shewn, that the execution was suspended by the writ of error, and therefore they ought to have shewn a determination of that writ before they took out execution.

Butler *versus* Cozens.

Where full costs in trespass, &c. Say. law of costs, 29, &c. ed. 1768.

(14.) **S**IR *Peter King* moved to have full costs in an action of trespass, *inter alia*, For breaking his lock upon his gate; and cited 2 *Vent.* 215. and 3 *Mod.* 39. *Curia*. Had it been for taking away the lock, full costs might have been given. *Powell* Just. But this seems to be laid as a trespass in order to try the title; and where the freehold comes in question, there 'tis held full costs shall be: But where the freehold does not come in question, there no more costs than damages. But if the Judge certifies the trespass to be voluntary and malicious, there the costs are to be full, by Stat. 22, 23 *Car.* 2. c. 9. But 'twas adjourned, to see if the judge who tried the cause would certify.

Withers *versus* Baker.

Declaration amendable, &c.

Aliter, if decl'n is amended the same term.

2 *Salk.* 520.

* *P.* 199.

(15.) **I**N this case *Holt* Ch. J. declared, That by the course of the court, a man may amend his declaration the second term; but that when the declaration is amended, new rules for pleading must be given; for the plaintiff perhaps must thereby be put to a new defence. The plaintiff the second term may amend, but not change * the *venue*, tho' issue be not joined, nor in any case afterwards. For in transitory actions the plaintiff has his election to lay his action where he pleases; therefore he shall not change it. Tho' the defendant may, on cause shewn.

Wells *versus* Ferguson.

Bond with a repugnant condition, the bond is single. Ante 191. 2 *Salk.* 463. S. C.

(16.) **A** Bond was for 100*l.* with a condition, That if he did not pay 50*l.* by such a day the bond should be void. The court adjudged the condition to be repugnant, and the bond to be single. 2 *Lew.* 77. *Note*; In this case *Holt* denied the case 39 *H.* 6. *fo.* 10. *a.* to be law.

Adams

Mich. Term 7 Ann.

Adams *versus* Hincloe.

(17.) **U**PON a special verdict the question was, Whether a copyhold could be entail'd, without laying a special custom for so doing; and adjudged *per tot cur'*, That it might.

Copyholds
entailable
sans special
custom.
but see 1 Bac.
Abr. 459.
Co. Lit. 60. a

And *Holt* Ch. J. rejected the notion of my Lord *Coke*, about the Stat *de donis* co-operating with the custom; and held that that statute turns all those estates, which at common law were fee-simple conditional, into estates-tail. He said, if a copyholder by licence makes a lease for years, the surrenderee (lessee) of that copyhold is within the Stat. 32 *H.* 8. to bring debt as assignee.

* Hil. Term, 1708.

* P. 290.

7 Annæ Reginae in B. R.

* The Queen *versus* Ld. Drummond.

(1.) **M**Y Ld. *Drummond* stood bound by recognizance to appear here the first day of this term; and Sir *Simon Harcourt* excusing his non-appearance by reason of sickness, moved, That his recognizance might be discharged, the Attorney General having orders, and being in court consenting thereto. But *Holt* Ch. J. said, Notwithstanding such consent, my Ld. *Drummond* not appearing in person, the court could not discharge the recognizance. But said, they could respite it till the next term; which was done accordingly.

Holt Ch. J.
Powell, Powis
and *Gould*
justices.

Recogni-
zance to ap-
pear, respit-
ed, not dis-
charged.
Post 253.

Sawyer *versus* Loggin.

(2.) **A**N information was for striking in the church, and an acquittal thereon; and then they exhibited articles in the Spiritual Court for brawling in the church; whereupon the
T t defendant

Striking and
brawling in
the church.
2 Ld. Raym.
850.

Hilary Term 7 Ann.

defendant moved this court for a prohibition. And for the prohibition it was suggested, that where a man is acquitted at common law, he ought not to be cited or sued in the Spiritual Court; and shew'd, that an information was exhibited against him for the same battery, and that he was acquitted, &c.

Sir Peter King, Recorder of London, also for the prohibition said, That the striking and brawling were so twisted together that
 * P. 201. 'tis all the same fact, and one offence; and * therefore being acquitted at common law, the plaintiff cannot proceed afterwards in the Spiritual Court, for the common law should have preference; and cited 4 Co. 20. That if an offence is committed which is partly temporal and partly spiritual, the Temporal Court shall draw the whole offence; and they shall not proceed in both courts. And acquittal or conviction in the Temporal Court shall be a bar in the Spiritual.

But the court would not grant the prohibition, because they should have pleaded this matter, which they suggest here, in the Spiritual Court; and if they had refused the plea, then they might have justly come and moved for a prohibition.

Powell said, Brawling and striking in the church were two distinct offences; and though they cannot proceed in the Spiritual Court for the battery, after an acquittal at common law, yet they may go on for the brawling, for the common law has not consueance of the brawling; which Holt Ch. J. seemed to agree: But said, that it would be hard to proceed in the Spiritual Court for the brawling, after an acquittal at common law for the battery. But for the cause aforesaid a prohibition was denied.

Sumner *versus* Ferryman.

A barge attached, the bargeman gave a bail-bond for his master to appear in Wind-for-court, &c and the bond held good.
 2 Inst. 483.

(3.) **D**EBT for 60*l.* on a bond dated 16 August, 1706. Upon oyer of the condition, it was set forth in *hac verba*, viz. *The condition of this obligation is such, that if Nicholas Hooper do and shall appear before the mayor, aldermen, bailiffs, and under-steward of the Borough of New Windsor, at the next court of record, to be holden at the Guild-hall of the said borough, on the 19th of August instant, there to answer to Will. Davis, Benj. Child, and Benj. Tompkins, in a plea of trespass on the case, then this obligation to be void, or else in full force, &c.* The defendant pleads in bar, that he was servant to Nic. Hooper, and that he was employed by Hooper in governing a barge, * loaden with several peoples goods, from Oxford to London; and that in his voyage, upon the river of Thames near New Windsor, the bailiff of New Windsor, pretending to have process against Nic. Hooper, and power and authority to attach the goods of Hooper, did attach the barge, then being *sub custodia & gubernatione* of the defendant; of which Hooper was master, and so hindered and detained them from going their voyage,

* P. 202.

Hilary Term 7 Ann.

voyage, and refused to let them go, unless the said *John*, the defendant, would give the said bond to the said bailiffs; so that the said defendant, to free the barge, and that he might deliver the goods to the owners, gave the said bond with the condition; *ubi revera* no bailiff ought to take such a bond; and that it was took *extorsive*, &c. *Et hoc parat' est verificare*, &c. To this plea the plaintiff demurs, and the defendant joined in demurrer.

Mr. *Pengelly* for the plaintiff said, that this was a good bond, and shall not be avoided by *durefs*, for there is no assault or restraint to his person; and a bond shall never be avoided by *durefs*, but when the person is put in some terror, and so when his goods and chattels are taken illegally or irregularly; for if the case was so, he might avoid his bond. But here he shall not avoid this bond, because regularly taken; and cited 7 *Ed.* 4. 22. *Bro. Abr.* tit. *Durefs*, pl. 16. 2 *Inst.* 483. *Co. Lit.* 253. b. *Roll Abr.* tit. *Durefs* 687. and therefore the plea does not avoid the bond; and the condition not being against law, the plea is ill; and so prayed judgment for the plaintiff.

Mr. *Raymond* for the defendant said, they had no authority to distrain this barge, and therefore the bond was void. There was indeed an action against *Hosper*, but it does not appear that this was his barge, only that he was master of it; also there were goods of other persons in the barge; and things for the benefit of trade shall not be distrained, like the common case of a horse in a smith's shop, &c. And as to what Mr. *Pengelly* said about *durefs*, he cited a case out of *The book of Ass.* 29. pl. 14. which case is abridged in *Roll Abr.* tit. *Durefs* 687. Where a man made a deed by *durefs* done to him by taking his * cattle, and though * P. 203. there was not any *durefs* to his person, yet it was adjudged he should avoid the bond: Then it may be objected, that though he may avoid a bond by *durefs* to his own goods, yet not to the goods of strangers, as these were; to which he answered, that the barge-man had a special property, &c. and for these reasons prayed judgment for the defendant. And at another day in this term the court gave judgment for the plaintiff; which was delivered by *Holt* Ch. J. Who said, that the defendant having submitted to the process, let it be right or wrong, the bond which he gives shall be a good bail-bond, and shall not be avoided. And if the goods of a stranger are in my custody, and are attached, if I do not contest it, but give a bail-bond, their being the goods of a stranger shall not avoid the bail-bond. Indeed if he had taken it *colore officii*, when there was no process at all, it had been void by the statute. *Powell* J. said, a man cannot avoid his bond by *durefs* to his goods, but only to his person. Q. Judgment for the plaintiff.

Hilary Term 7 Ann.

Legg *versus* Stradwick.

Replevin.
2 Salk. 414.
Holt 417.
S. C.

(4.) **T**HE Earl of Bedford, the 2d of Jan. 1692. demised to Anne Horsenell from Lady-day 1695. for twenty-one years; which term by mean assignments came to Stradwick the defendant; and he, 25th of March, 1703. demised to Jacob Broom, from the 25th of March unto the full end and term of one year, and so *de anno in annum quamdiu ambabus partibus placuerit*, rendering 40*l.* rent *per ann.* Jacob enjoyed the term from 21st of March to 17th of December, and then died intestate; and administration was granted to Legg the plaintiff, who entered into the said land; and because 60*l.* a year and a half's rent was due, he avows taking the cattle, &c. The plaintiff in bar to the avowry said, he did not demise to Broom, as he has alledged in the avowry; and on that issue is joined, and verdict for the defendant. And last term,

* P. 204. * Mr. Whitacre moved in arrest of judgment, because it was but a lease for one year to Broom; then Stradwick's distraining for one year and a half's rent was ill, because he distrained after the lease was ended. But this term the court gave judgment for the avowant, that the distress was lawful; for Holt Ch. J. said, such a lease as this is not a lease for two years, or a lease at will, but 'tis a lease for every particular year, and yet you may distrain for ten years rent, at the end of ten years; because one lease springs so out of the other, and out of the same contract, as that when one year is ended, there is an end of that lease, and when the lessee enters on another year, 'tis another lease for a year, & *sic toties quoties*.

The Parish of St. Giles in the Fields *versus* The Parish of Weybridge in Com' Surry.

A. removed
by certificate
from B. to C.
takes an ap-
prentice, who
serves out his
time at C.
and lives two
years, cannot
be removed
with his ma-
ster.
Fortes. 315.
S. C.

(5.) **S**IMONS, a taylor by trade, an inhabitant of St. Giles's parish, removes to Weybridge in Surry, with a certificate, and there takes an apprentice, who served out his time, set up his trade, and lived two years in Weybridge. But his old master being become chargeable, the justices of the peace made an order to remove Simons, and his said apprentice, as part of his family, to the parish of St. Giles, which order was moved to be quashed; because the word *family* must not be taken in so large an extent. And this term the court gave their resolution that the order was ill.

Holt Ch. J. said, The question was, whether this apprentice ought to be removed with his master, by the word *family* in 8,

Hilary Term 7 Ann.

9 W. 3. c. 30. The act says, *That he and his family, and children born there, shall be removed, unless they have gained another settlement there.* Besides, this apprentice never came with a certificate; the statute says, *any that moves himself, he and his family shall be removed;* that is, they that came along with him shall go back, and no other than them and the children born after; and for * them there is a special provision in the act. *Secondly,* He * P. 205. inhabited two years after the apprenticeship, which is another settlement. Therefore he is well settled at *Weybridge*, and cannot be removed to *St. Giles's*. Whereto *Powell* Just, &c. accorded.

Powis said, it was like the case of *St. Brides* and the *Savoy*, ^{2 Salk. 533. Holt. 573. S. C.} where a lodger in the *Savoy* came into *St. Brides* parish, and rented a shop in *Fleet-street*; but gained no settlement there; but takes a servant or apprentice, who served his time with the lodger; this was adjudged a good settlement for the servant or apprentice, tho' the lodger or master himself had never gained one. Because the service being performed in the parish of *St. Brides*, it gained the servant a legal settlement. And the notice to be given according to the statute, does not extend to a servant or an apprentice.

Could J. said, Seeing that he had lived two years in *Weybridge* after he was out of his time, he could not be removed; but if the master had been removed during his apprenticeship, it had been another case.

Parish of St. Albans *versus* Parish of St. Botolph Bishops-gate.

(6.) **A**N order of two justices was made to remove a poor man from *St. Alban's* to the parish of *St. Botolph*, which says, that upon complaint being made to them, &c. upon examination it appears, he is likely to become chargeable; and it appearing that he was bound apprentice in the parish of *St. Botolph Bishops-gate*, and that he there served as long as his master lived, therefore they adjudge that to be the place of his last legal settlement, &c. ^{Order to remove a man where he was bound apprentice, and served as long as his master lived, ill. Ld. Raym. 1371. 1 Str. 594. Burr. Set. Caf. 570.}

Sir Edward Northey moved to quash this order, for 'tis altogether uncertain. For *1st*, It does not appear that he was bound by indenture, and if he was not, he does not gain a settlement. *2^{dly}*, It does not appear how long he * served, only that he served * P. 206. as long as his master lived, which might not be above a week, ergo 'tis uncertain.

Mr. Raymond for maintaining the order said, 'tis a question if the bare binding of it self does not make a settlement, and the forty days mentioned in the statute is only as to the residence.

U u

2dly,

Hilary Term 7 Ann.

2dly, The justices do adjudge *St. Botolph Bishopsgate* to be the place of last legal settlement, which is enough for them to remove him. But the court concluded the place of his last legal settlement from the premises, which are ill; and says, *therefore* we do adjudge, &c. and for these reasons before given by Sir E. Northey, they quashed the order for uncertainty. And

Holt Ch. Just. said, That notice is to be given when a man comes into a parish, but no notice is necessary in case of an apprentice or servant; and barely binding a man apprentice, does not gain a settlement, unless he serves forty days. And then he took exceptions, that by the act of parliament, when an order is made by corporation justices, the appeal must be at the next quarter sessions: But upon reading the statute it appeared, that the borough of *St. Alban* was excepted out of the act.

Order quashed.

Queen and The Commissioners of the Land-tax for Barnwell.

Mandamus to
tax lands e-
qually.
Post 254.

(6.) UPON the motion of Sir Peter King, recorder of London, the court granted a *mandamus* to the commissioners of the land-tax for *Barnwell*, to tax the lands there equally.

Fowbert versus Ekins.

New trial de-
nied.
5 Bac. Abr.
240, &c.
* P. 207.

(7.) SIR J. Mountague, Attorney-general, moved for a new trial in this cause; because the *possea* was eaten with rats. But the court denied it; for * part of it remained, and particularly the costs and damages, written with the party's own hand.

Queen versus Griffith.

Indictment of
felony quash-
ed.
2 Hawk. P.C.
180, &c.

(8.) MR. Dee moved to quash an indictment against the defendant for taking goods *feloniously*, which the prosecutor had as executrix to J. S.

Curia. It is not said where he took them, nor in what manner, so that it does not appear he stole them.

Quashed *nisi*.

Hilary Term 7 Ann.

Hull *versus* Holliday.

(9.) **A**N action brought against a bankrupt; the defendant pleads the statute of bankrupts, in which 'tis said, *That the person who does as the act directs may plead the general issue*; and that he manifestly became a bankrupt before the day, &c.

Holt Ch. Just. said, this plea will not do; for when a statute gives a plea, it must be pleaded in the words of the statute; and besides, by this pleading, it does not appear the person was within the act; for the debt might be after he became a bankrupt, and before he became a public bankrupt, and then he would be out of the privilege of the act. Therefore judgment for the plaintiff, *nisi* cause shewn before the end of the term.

5 G. 2. c. 30. s. 7. a bankrupt may plead his bankruptcy (generally) and that the action accrued before the bankruptcy; and give that act, and the special matter, in evidence. See the statute. And such plea must conclude to the country. 1 Barne's Notes, 236. Poole *v.* Broadfield.

Statute of bankrupts pleaded, ill. This decision seems to have been on the 4 Ann. c. 17. explained and amended by 5 Ann. c. 22. and afterwards continued by 7 Ann. c. 25. but now expired: At present, by cause of action evidence. See *v.* Broadfield.

Grumble *versus* Jones in B. R.

(10.) **A** SPECIAL verdict finds, that the grandfather was seised in fee, and by will devises thus: *I give to my daughter Agnes for life, remainder to A. L. and his heirs; and for default of such heirs, remainders over.* And the question was, If this be an estate in fee or in tail? Holt Ch. J. You will find it a hard point to make this an * estate-tail. Sir Peter King urged, that it was so; and cited the case of *Idle and Cook*, Easter term, 4 Ann. If the remainder had been to his brother, or to any body that had been heir at law, it would have been a tail; for then he could not have died without an heir, and so a remainder might properly be; or if it had been *de se exente*, or the like: But these limitations were never carried further. But the court gave judgment, *That this was a fee*, but made the rule *nisi*, &c. Note; The controversy was between the heir of the devisor, and the heir of the devisee no way related to the devisor.

Devise in remainder to A. and his heirs, and for default over, is a fee.

* P. 203. Vide ante, 57.

Reeves *versus* Gower in C. B.

(11.) **I**N a special verdict the case was found thus: *A. by his will devises lands to B. and then bequeaths legacies; and after two or three legacies to different persons, he gives 5*l.* to C. and directs B. to pay it, but gives him two years time to pay it. The jury find the lands to be 50*s.* per ann.; and the question was, What estate B. had, whether for life or in fee? And adjudged to be a fee.* For that the devise here was a sum

Devise to A. paying a sum to B. within two years, A. has a fee. 6 Co. 16. Collyer's case.

2 Bac. Abr. 54. and the authorities there cited.

in

Hilary Term 7 Ann.

in gross, and a *debitum in presenti solvend' in futuro*; and it was a sum certain to be paid by B. at all adventures, whether the land yielded full 5 l. or not; and so not like the cases, where the sum devised is to arise out of the profits, &c.

Price *versus* Clark in B. R.

Ante 140.
2 Salk. 692.

(12.) **T**HIS case was now again moved, and agreed, that the words, if true, would subject him to ecclesiastical censure, and thereupon Sir Peter King prayed a consultation; and cited 3 Lev. 71, 18. Godb. 446. and 2 Roll. 297. Mr. Solicitor-general argued, That defamation, to give the Spiritual Court jurisdiction, must be in respect of the cause, not of the person; and therefore there is * no difference between a clergyman and a layman. 4 Co. 20. 2 Inst. 692. And unless it subject him to ecclesiastical censure, tho' he be a clergyman, yet they have no jurisdiction for such defamation. Godb. 446. Nor can he have prejudice by the words; for when a parson is admitted by the ordinary, can he afterwards be deprived for ignorance? He might be refused for ignorance, but I never heard of one parson deprived for it. This parson was only a curate, &c.

Powell. But this is his way of living, *i. e.* his trade; and to say one is ignorant in his trade is actionable; so to say such an attorney, &c. is ignorant in his profession. Powis. Take all the words together, they import a great scandal. Holt Ch. J. You must make something out for which he is suable in the Spiritual Court. *Et adjournatur.*

(13.) *Note*; Towards the conclusion of this term, Holt Ch. J. declared for law, That no action of trespass *vi & armis* would lie for a tenant at will against his landlord, for the lord's entering or distraining for rent, &c. and cited Dyer 119. 10 E. 4. 7. 2 Inst. 105. and Mo. 105. And note Finch's Law, l. 3. c. 6. That no action of trespass will lie for a lessee for years against the lessor, altho' he distrain without cause. And see there the reason. 2. 9 Co. 76. Yelv. 148. Wing's Max. 1, 703.

* Easter

* Easter Term, 1709.

* P. 210.

8 Annæ Reginae in B. R.

Lord Altham *versus* Lord Anglesea.

(1.) **T**HIS was an issue directed out of Chancery, to try the validity of *James* late Earl of *Anglesea's* will. The case was this: *James* Lord *Anglesea*, tenant in tail of lands in *Ireland*, levies a fine, and the next term following suffers a common recovery, wherein the conusee was made tenant to the *præcipe*, and tenant in tail came in as vouchee: It was found, that there was no deed or other writing, between the levying the fine and suffering the recovery to lead the uses of the fine; but tenant in tail, supposing himself seised in fee by the recovery, devises the lands in question to the plaintiff.

A fine levied, but no declaration of uses, and then a recovery had, 2. If to the use of the conusor or conusee? 2 Salk. 676. Gilb. Eq. Rep. 16. Holt 733, 736. S. C. *

There were two points argued, which were saved upon the trial. 1. As to the matter of evidence; whether depositions taken in *Ireland* by virtue of a *dedimus*, certifying that the papers sent over were true copies of certain fines and recoveries suffered there, and witnesses swearing that they were the same, and had received no alteration, &c. be good evidence. 2. Whether, there being no deed to lead the uses, according to the statute of frauds and perjuries, the use resulted to the conusor, or went to the conusee, so as to make a good tenant to the *præcipe*.

1. If depositions in *Ireland* be good evidence here.

Sir *Simon Harcourt*, and Sir *Thomas Powis*, for the defendant, argued, That the evidence was not good; because the best evidence that can be had must be given; and here * they might have sent one to have examined these records, who might have taken copies of them, and have attested them to be true copies *viva voce*: And as to the other point, that the uses not being declared in writing, the fine could not make a tenant to the *præcipe*, and so the recovery was void; for they said, a fine without uses declared in writing, would have no effect, but it would result to the conusor in the same condition it was before the fine levied, and so not cut off the intail.

* P. 211.

For the plaintiff it was argued, by Serjeant *Hooper* and the Solicitor-general and Mr. *Eyre*, That the depositions were good

X x

evidence;

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evidence; for the depositions of one that is sick, or cannot come, may be read; and all those, through whose hands these passed, swore they were not altered. As to the second point, that the intent was plain, viz. only to make a tenant to the *præcipe*, in order to suffer a common recovery to cut off the intail, to the end that *James Lord Anglesea* might dispose of his estate by will. That it was a question, Whether uses were included in the statute by the words *trusts and confidences*; that the notion that a use shall result to the conusor, if it is not declared otherwise in writing, is grounded on 1 *Irf.* 23. *b.* But it appears by *Shortbridge* and *Lampew's* case, *Micb.* 1 *Ann.* and *Reynolds* and *Blake*, 9 *W.* 3. That if a fine be levied, it shall not be esteemed as of no effect, but shall go to the conusee, if nothing appear to the contrary; that a fine is like a feoffment, and is a feoffment of record; and if a feoffment be made to *B.* of *Blathacre* for 1000 *l.* it will go to *B.* and not result; that presumptions are to be made for the benefit of common recoveries, being now become common assurances.

Upon arguing of this case, *Holt Ch. Just.* said, That if tenant in tail discontinue in fee, and a *præcipe* is brought against one who is not tenant to the *præcipe*, and tenant in tail comes in as vouchee, whereby he admits the stranger to be tenant to the *præcipe*, this shall estop the tenant in tail, and his heirs general, but not the issue in tail; yet trusts and uses are synonymous in the law,

* P. 212. *Ec.* Suppose a bargain and sale is made to suffer a * common recovery, within a year, and none is suffered, it is to the use of the bargainor. But in this case, where the *præcipe* is brought against the conusee, there is a use arises to him by operation of law.

Powell said, He was not so clear as the Lord Ch. Just. but said, that a penny consideration would prevent the resulting of the use, but here was none; upon levying the fine there was a use, and where did it vest but in the conusor, and how came it out of him?

The last day of this term the court gave their opinion *seriatim.*

Evidence. *Gould.* There are two points in question: 1. Whether the depositions of one who is out of *England*, where no process will fetch him, may be read as evidence to prove the record? And I hold it may; as also in case one be sick, *Ec.*

2. As to the tenant to the *præcipe*; I hold, that here is a good tenant to the *præcipe*; for I do not take it to be within the statute; if there be a common recovery suffered, it must be presumed that there is a tenant to the *præcipe*; and if there be none, it must be avoided by a writ of error.

Powis of the same opinion, as to the first point, for the same reason.

2. I hold

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2. I hold, that if a fine be levied to *A.* with consideration at this day, by a parol averment of the money being paid, it will vest the use in the conusee, and so I hold it would be, tho' within the statute; it was certainly so before the statute, and is so at this day.

Besides, they being but one conveyance, you cannot raise a construction of law in the middle of a conveyance.

Upon the reason of *Dowman's* case, the deed may follow a long ^{9 Co. 8. a.} time after the fine; and in *Dyer* it follows four years after; and so it may be longer, if there be no act done in the mean time, declaring the intent to be otherwise.

Powell. As to the first, I would have it brought to a certainty; it is better to have witnesses *viva voce*, where * they may be had. * P. 213. But suppose the record be out of the queen's dominions, or in the *West Indies*, or in *Scotland*, I take it, that a deposition would do in such cases, &c.

As to the second point, as it is dangerous to avoid such conveyances, so it is to break into the statute.

Tho' the recovery shews the intent, yet it is not such a writing as is intended by the statute; and the common law will not distinguish between trusts and uses.

Neither the conusee nor a stranger can take a use by a parol averment. But here I hold that the conusee did not take by way of use, but at common law: But here there must be a parol averment to prevent the resulting of the use. But such averment will not be admitted.

The fine had its operation immediately before the recovery, so as here must be a parol averment, that it was to the use of the common recovery; and this parol averment, hindering the resulting of the use, is out of the statute; for it is not to raise a use, but to prevent its resulting.

Holt Cap' Just' said, As to the first point the law requires the best evidence that can be had. But we cannot compel any one to come out of *Ireland*; nor oblige any one to go and inform himself, in order to be a witness: But this rule is to be interpreted with respect to the person deposing; as that a man's affidavit shall not be read, when he is here to give his evidence *viva voce*; but when the person cannot be brought into court, tho' there be other witnesses to give evidence *viva voce*, yet the depositions of those that are absent may be read; he cited 2 *Cro.* 541. but said, he would not warrant the authority of the case.

To the second point he said, this was out of the statute of frauds and perjuries. There be two clauses in the statute, the first is, *That all declarations of trusts shall be manifested by some writing, signed by the party, or by his last will in writing, or else be void*; the second is, *That trusts resulting by implication of law, shall be as if this act had not been made.* Now I hold, that since the statute

there

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* P. 214. there must be a parol averment to make the use result; * for at common law, if a fine was levied, it was to the use of the conusee till such averment.

When tenant in tail comes in as vouchee, he admits the conusee tenant to the *præcipe*; and his meaning is plain, that he intended to make himself tenant in fee; not from the use that should result from the conusee, but from that resulting from the seisin of the recoveror. *Ideo, nemine contradicente*, judgment for the plaintiff.

Nota; In this case, *Holt* also said, that the statute of frauds, which enacts, *That the declaration of trusts shall be manifested by some writing signed by the party*, extends only to the strangers, and not to the conusee of the fine; for there need be no writing to declare the use to him, therefore it cannot result without a parol averment: But when a fine is levied, and 'tis to the use of a stranger, then it is within the statute, and must be declared in writing.

Queen versus Vicars.

Mandamus to restore a capital burghs.
Cro. Jac. 506.
1 Sid. 14.
5 Mod. 257.

(2.) **A** *Mandamus* to the corporation of *Doncaster*, to restore *Vicars* to be a capital burghs; to which they return, that the corporation have, time out of mind, had a toll for coals, viz. for every wain load going through the town a coal, of the value of one penny; for every cart load a coal to the value of a halfpenny; and for every horse load a coal, as big as a piece of wood, kept time out of mind by the corporation: That the said *Vicars* did, contrary to his oath, hinder the gathering of this toll, as well by menaces to the toll-takers, as by persuading the owners of the coals not to pay toll, and telling them, that he would uphold them in their refusal.

After several arguments, the court was of opinion, that it was not sufficient cause to turn him out. For *Powell* Just. said, it was no more than saying the toll was unreasonable, when it appears so to be to the court, and also uncertain. *Ideo* a peremptory *mandamus* was granted.

* P. 215.

Indictment for refusing the office of a high constable.
Vide post, 227.
2 Salk. 502.
Holt 152.

* Queen versus Jennings.

(3.) **I**NDICTMENT for refusing to take upon him the office of high constable for the hundred of *Farnham*, *licet debito & legali modo electus fuit, &c.* To which the defendant pleads not guilty, and the jury find a special verdict, That the defendant *Jennings* was at a court, held for the manor of the hundred

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hundred of *Farnham*, 16 Sept. anno sexto Annæ reginæ, debito modo electus chief constable for the hundred of *Farnham*; and they find, that he being so elected, did refuse, &c. They find farther, that within the manor of the said hundred of *Farnham*, there are several other manors belonging to divers lords, the inhabitants whereof used to be elected for the said hundred; they find also, that there is the manor of the town of *Farnham*, within the manor of the said hundred, in which there is a court-leet; and that the defendant is an inhabitant within the said town of *Farnham*, and *non alibi*; and that no inhabitant of the town of *Farnham* ever served as high constable for the hundred of *Farnham*.

The question arising upon the special verdict was, Whether the defendant being in a particular leet, is excused from serving as high constable of the hundred? And on debate, the court held, *that he is not excused*. Holt Ch. Just. said, that high constables are officers at common law; and that the statute of Ed. 3. did not give them an additional authority; and that if a hundred have not a leet, the high constable must be chosen at the sheriff's tourn, yet his power would be restrained to the particular hundred; and I do not know that the statute of *Winchester* makes such an alteration as will exempt him; he said likewise, that in a private leet the lord may sit as judge, and exclude the steward. *Quære*, If so in a publick leet.

King v. King,
3 Keb. 197.

The court gave judgment for the queen, upon the special verdict. But exceptions being taken to the indictment, it was put off to *Trinity* term next.

* *Smith versus Bowen*.

* P. 216.

(4) **T**HE defendant *Bowen* was indicted at the *Old Bailey* for the murder of one *Smith*, and found guilty, but obtained the queen's pardon; the appellant, an infant, as brother and heir to the deceased, lodges an appeal *in propria persona* against the said *Bowen*, before the justices of oyer and terminer and gaol delivery, the same sessions at the *Old Bailey*, which being removed by *certiorari* in *B. R.*

Appeal of murder after a pardon.
Vide post, 230, 254.
2 Ld. Raym. 1283.
Holt 355.
S. C.
And see 5 Burr. 2643, &c.

Sir *Thomas Parker* for the appellant moved, that he might be admitted *per guardianum* in *B. R.* which the court refused, as too late, for it ought to have been commenced by guardian at first, and then they should have moved to have had him admitted by his guardian in *B. R.* The court said, that if the defendant pleaded this in abatement, the appellant might confess his plea, and commence a new appeal by bill; for a *non suit* is peremptory; but an *abatement* is not.

Y y

Afterwards

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Appeal abated per cur' ex officio.

* N. B. He was not above six or seven years old.

* P. 217.

Afterwards the appellee being brought to the bar, and the appellant being in court, his counsel would have abated the writ, and brought a new appeal by bill. But the court would not let them. And *Holt* said, that this is not like the case of *Watts* and *Brains*, 3 Co. *Entries*; for there the writ was void. At another day, the appellee being brought to the bar, the appellee's counsel refusing to plead the infancy in abatement, designing to take advantage of it after trial, the court said, that since they would not plead the infancy in abatement, the court would abate the first appeal *ex officio*; and ordered it to be entered, that the said appellant being in court, and it appearing, by inspection of the appellant, that he was under age, * *ideo* the court *ex officio* does abate the appeal. And *Holt* said, that if the appellant had not been in court, then there must have been a writ to have brought him into court, to inspect him. Hereupon the appellant brought another appeal by bill, and declared against him * *in custodia marescalli*, and the appellee being arraigned *instante*, demurred to the appeal, and pleaded not guilty. The court ordered the abatement of the first appeal to be entered as the first day of the term; and that the pleading to the second should be entered *instante*, that the demurrer might be first determined; and for that end made it a *consilium* to be argued in *Trinity* term next.

The appellee prayed to be admitted to bail; which the court said, they could do on issue joined, demurrer, or *cur' advise vult*, if he could find four sufficient bail, who would be bound body for body. But those he offered not being approved of, he was remanded to the *Marshalsea*.

Young *versus* Slaughterford.

Pasch' octavo Annæ Reginæ.

Bill of appeal of murder. Vide 5 Burr. 2646, &c.

SURREY ff. Memorandum quod die Mercurii proxime post quindenae Paschæ isto eodem termino, coram dominâ reginâ apud Westmonasterium venit Henricus Young, de Hartfield in comitatu Suffex, frater et hæres Janæ Young spinsteræ, sororis suæ nuper defunctæ, in propriâ personâ suâ, et protulit hic in curiâ dictæ dominæ reginæ, tunc ibidem, quandam billam suam *versus* Christopherum Slaughterford, alias Slaughterford, de Shalford in comitatu Surrey prædicto, brasiatorem, in custodiâ marescalli, &c. de morte prædictæ Janæ quondam sororis ipsius Henrici, unde eum appellat; et sunt plegia de prosequendo, scilicet Willielmus Godfrey, de Godalming in comitatu Surrey, generosus, et Henricus Young, de Kirdford in comitatu Suffex, husbandman: Quæ quidem billa sequitur in hæc verba; Surrey ff. Henricus Young, de Hartfield in comitatu Suffex, frater et hæres Janæ Young spinsteræ

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steræ, sororis suæ nuper defunctæ, in propriâ personâ suâ instanter appellat Christopherum Slaterford, alias Slaughterford, de Shalford in comitatu Surrey prædicto, brasiatorem, in custodiâ mareschalli Mareschalliæ, dominæ reginæ coram ipsâ reginâ existentem; de eo, quod ubi præfata Jana, soror ipsius Henrici, fuit in pace Dei et dictæ dominæ reginæ nunc, apud Compton in comitatu Surrey prædicto, 21^o die Novembris anno regni dominæ Annæ, Dei gratiâ Magnæ Britannię Franciæ et Hiberniæ reginæ, fidei defensoris, &c. septimo, circa horam tertiam post meridiem ejusdem diei, ibi scilicet apud Compton prædicto in comitatu Surrey prædicto, venit prædictus Christopherus felonice voluntarie ac ex malitiâ suâ præcogitatâ, ut felo dictæ dominæ reginæ nunc, ac contra pacem dictæ dominæ reginæ nunc coronam et dignitatem suas, anno die et horâ prædictis apud Compton prædicto in comitatu Surrey prædicto, vi et armis, &c. ac in et super eandem Janam Young, in pace Dei et dictæ dominæ reginæ ut præfertur existentem, felonice voluntarie ac ex malitiâ suâ præcogitatâ insultum fecit; et cum quodam baculo ligneo valoris unius denarii, quod ipse idem Christopherus in manu suâ dextrâ anno die horâ et loco prædictis, in comitatu Surrey prædicto, habuit et tenuit, præfatam Janam Young in et super sinistram partem capitis ipsius Janæ, prope frontem ejusdem Janæ, anno die horâ et loco prædictis in comitatu Surrey prædicto, felonice voluntarie et ex malitiâ suâ præcogitatâ verberavit et percussit; adtunc et ibidem dans eidem Janæ cum baculo ligneo prædicto, in et super dictam sinistram partem capitis ipsius Janæ prope frontem ejusdem Janæ, unum vulnus mortale, latitudinis duorum pollicium, et profunditatis unius pollicis: De quo quidem vulnere mortali præfata Jana Young, anno die et horâ prædictis apud Compton prædicto in comitatu Surrey prædicto, instanter obiit. Et sic prædictus Christopherus felonice voluntarie ac ex malitiâ suâ præcogitatâ præfatam Janam Young, sororem prædicti Henrici ac ejus hæres idem Henricus est, modo et formâ prædictâ anno die et horâ prædictis, apud Compton prædicto in comitatu Surrey prædicto, interfecit et murdravit, contra pacem dictæ dominæ reginæ nunc coronam et dignitatem suas. Et quam cito prædictus Christopherus feloniam et murdrum feceret, ipse idem Christopherus fugit, et prædictus Henricus prædictum Christopherum recenter insecutus fuit de villâ in villam, usque quatuor villatos propinquiores, et ulterius quousque, &c. Et si prædictus Christopherus velit dedicere feloniam et murdrum prædictâ, super eum in formâ prædictâ impositâ, prædictus Henricus paratus est versus eum probare prout curia, &c.

Et prædictus Christopherus Slaterford, alias Slaughterford, in propriâ personâ suâ venit et defendit vim et injuriam quando, &c. et omnem feloniam et murdrum et quicquid, &c. et petit judicium de billâ appelli prædictâ; quia dicit quod ipse tempore feloniæ et murdri prædicti fieri suppositus, ac diu antea et postea

*Plea of non-
commorancy.*

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Plea of not
guilty, and
issue.

Replication
to the plea of
non-cogitancy.

Award of
ven. fac.

Co. Ent. 60.
a.
Cro. Car. 532.
Figgot v. P.
got, Intr. Tr.
14 Car. 1.
rot. 685.
Continuance.

postea fuit commorans et conversans apud Shalford in comitatu Surrey. Absque hoc quod ipse, dicto tempore feloniam et murdri prædicti fieri suppositi, aut ad aliquod tempus antea vel postea fuit commorans et conversans apud Shalford in comitatu Surrey. prout per prædictam billam appelli superius versus eum supponitur: Et hoc paratus est verificare, unde petit judicium de prædictâ billâ appelli, et quod billa illa cassetur, &c. Et quoad feloniam et murdruum prædicti idem Christopherus dicit, quod ipse in nullo est culpabilis; et inde de bono et malo ponit se super patriam, et prædictus Henricus Young similiter, &c.

Et prædictus Henricus Young in propriâ personâ dicit, quod per aliquam per prædictum Christopherum Slaterford, alias Slaughterford, superius placitando allegatam, billa appelli prædicta minime cassari debet; quia dicit quod ipse idem Christopherus Slaterford, alias Slaughterford, tempore feloniam et murdri in billâ ipsius Henrici Young prædictâ superius mentionat, per prædictum Christopherum Slaterford, alias Slaughterford, fieri suppositi, fuit commorans et conversans apud Shalford in comitatu Surrey prædicto, prout per billam prædictam ipsius Henrici Young superius supponitur. Et hoc petit quod inquiretur per patriam; et prædictus Christopherus Slaterford, alias Slaughterford, similiter, &c. Ideo tam quoad triandum exitum istum, quam prædictum alium exitum inter prædictum Henricum Young et præfatum Christopherum Slaterford, alias Slaughterford, superius junctum, veniat inde jurata coram dominâ reginâ apud Westmonasterium die lunæ proxime post crastinum ascensionis Domini, et qui nec, &c. ad recognizandum, &c. quia tam, &c. Idem dies datus est partibus prædictis ibidem; viz. prædicto Christophero in custodiâ mareschalli Mareschalliae, &c. Ad quem diem coram dominâ reginâ apud Westmonasterium veniunt tam prædictus Henricus Young in propriâ personâ, quam prædictus Christopherus Slaterford, alias Slaughterford, in propriâ personâ suâ, &c. Et vicecomes comitatus prædicti, videlicet Willielmus Stevens, armiger, retornavit breve de venire facias prædictum in omnibus servitum et executum, unâcum pannello de nominibus juratorum, quorum nullus, &c. Ideo preceptum est vicecomiti quod distringat juratores prædictos per omnes terras, et quod de exitibus, &c. ita quod habeat corpora eorum coram dominâ reginâ apud Westmonasterium, die Sabbati proxime post crastinum Sanctæ Trinitatis, ad recognizandum in formâ prædictâ, &c. Idem dies datus est partibus prædictis, videlicet prædicto Christophero custodiâ mareschalli Mareschalliae, &c. Ad quem diem coram dominâ reginâ veniunt tam prædictus Henricus Young in propriâ personâ suâ, quam prædictus Christopherus Slaterford, alias Slaughterford, in propriâ personâ suâ, sub custodiam mareschalli, &c. Et juratores juratæ illæ, exacti, isimiliter veniunt, qui ad veritatem de et super premissis dicendam electi triati et jurati, quoad exitum prædictum inter partes prædictas superius ultimæ junctum, dicunt
super

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super sacramentum suum prædictum, quod prædictus Christopherus Slaterford, alias Slaughterford, tempore feloniam et murdri prædicti per ipsum superius fieri suppositi, fuit commorans et conversans apud Shalford prædicto in comitatu Surrey prædicto, prout prædictus Henricus Young superius allegavit Et quoad feloniam et murdram prædicti, juratores prædicti ulterius super sacramentum suum prædictum dicunt, quod prædictus Christopherus Slaterford, alias Slaughterford, est culpabilis de feloniam et murdro prædicti ei superius impositi, prout prædictus Henricus Young ipsum prædictum Christopherum Slaterford, alias Slaughterford, inde superius appellavit. Et juratores prædicti ulterius dicunt super sacramentum suum prædictum, quod prædictus Christopherus nulla habet bona seu catalla terras aut tenementa, nec habuit tempore feloniam et murdri prædicti in formam prædictam commissam, nec unquam postea ad eorum notitiam. Et super hoc, prædictus Henricus Young petit iudicium et executionem versus præfatum Christopherum Slaterford, alias Slaughterford, de et super veredictum per curiam hic reddi: Super quo visis et per curiam hic intellectis omnibus et singulis premissis, maturaque deliberatione inde prius habitâ ad petitionem prædicti Henrici Young, consideratum est quod prædictus Christopherus Slaterford, alias Slaughterford, suspendatur per column quousque mortuus fuerit.

Judgment.

The defendant *Slaughterford* was indicted at *Kingslon* assizes for the murder of *Jane Young*; and the jury there acquitting him against evidence, *Holt* Ch. Just. who tried him, remanded him, and ordered an appeal to be brought against him, and the appellee being brought up by *habeas corpus*, and committed to the *Marshalsea*, an appeal was accordingly brought; and being brought to the bar, and arraigned in *French*, he pleaded in abatement, that the vill in which he was commorant was *Sbaford*, *absque hoc* that it was *Sbalford*.

Appeal of murder after acquittal, directed by Holt. *Stranger* 203. See the 4 Ann. c. 16. s. 11.

Mr. *Raymond* for the appellant said, that the appellee's plea was not to be received without an *affidavit*, since the act for amendment of the law, it being a dilatory plea; at first the court inclined that the plea could not be received without an *affidavit*, criminal causes not being excepted out of the act, (the exception of appeals in the act relating only to the preceding clause): But the appellee being brought the next day, the court was of opinion, that the plea might be read without an *affidavit*, because tho' this plea for the most part is dilatory, yet it is not in this case, for the appellee must plead over, and * issue joined on that as well as upon not guilty, and both may be tried at the same time; and accordingly the plea was received, and read in *French* by his counsel, and the appellant's counsel *instante* joined issue in *French*, to which the appellee's counsel said (*semblement*.) The court ordered, that a *venire* should be issued out,

* P. 218.

Z z

bearing

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Ante 217.

bearing *teste* the first day of term, and the appellee should be tried at the bar; upon which the appellee was remanded to the custody of the marshal, because none would be bound body for body for him; the court said, there must be four bail in an appeal of murder.

Note; Holt Ch. Just. ordered, that his irons should be taken off when he was brought into court. *Vide post* 228.

Sawyer *versus* Mawgridge.

Double plea
by the late
act 4, 5 Ann.
Holt 207.
S. C.

(6.) **D**EBT upon a bond, the defendant, according to the late act, pleads two pleas, *viz. non est factum*, and that he had satisfied himself by sale. Issue thereupon, and verdict for the plaintiff, and for the defendant it was moved in arrest of judgment: Upon oyer of the deed, it was in these words, *These are to authorize you J. S. to sell so many of my goods as come to 9l. to pay my debts, which I do hereby acknowledge to owe to you, &c.*

Holt and Powell held, that the action lay for those words, for the word *oblige* is not necessary to make a bond; for if one under hand and seal acknowledge himself indebted, 'tis enough to bind him.

Powis held, that the words *I do hereby acknowledge to, &c.* were by way of parenthesis, which Holt opposed.

Judgment for the plaintiff.

Authors cited for the plaintiff. *Dyer* 21. 226. *Kelway* 34. b. i *Vent.* 238. *Pro def.* i *Vent.* 42. 339.

* P. 219.

* Roberts *versus* Morgan.

In trespass,
justification
for horses,
cows, &c. not
good for
horses only.
Holt 568.
S. C.

(8.) **T**RESPASS for going over the plaintiff's close with horses, cows, and sheep; the defendant justifies, that he has a way for horses, cows, and sheep, and says, that such a day he went over with horses; and upon demurrer it was adjudged ill; for it is a justification only for horses. *Judgment for the plaintiff.* Sed quare.

Nelson *versus* Collins.

Error on a
blank declaration,
yet judgment
affirmed.
See the statute
4 Ann.
c. 16.

(8.) **A** WRIT of error out of the Common Pleas; the error assigned was, that in the declaration it was *Collins per Busby per attornatum suum*, without any Christian name.

Holt

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Holt Ch. Just. said, that he remembered a case where it was assigned for error, that the attorney, by whom the party appeared, was no attorney of that court. But it was disallowed for error; and that is not the merits of the cause, and may be helped by the late act, it being after verdict. *Judgment affirmed.*

Harrington *versus* Bush.

(9.) **A**CTION of trespass for taking cattle, the defendant pleads, *quod possessionatus fuit* of the close; and that he took them damage-feasant.

The question was, Whether in this case *possessionatus fuit* was sufficient? Or, whether the defendant should have set forth his title?

For the plaintiff was cited *Pell vers. Garlick*, 2 Lutw. 1492.

* *Powell J.* said, That if the title cannot come in question, *possessionatus fuit* was sufficient. But perhaps in this case the title may come in question; and cited *Yelverton*, *Foldar vers. Ridge*, and *Cro. Jac. Purefoin vers. Genis*.

Holt Ch. Just. said, That he thought the title could not come in question; for the action is brought only for taking his cattle; if he had claimed the land, the action should have been for entering the land; but where the trespass is only for a personal act, as beating or taking cattle, *possessionatus* is sufficient.

If *A.* is possessed, and *B.* comes and treads down his corn, and *A.* *molliter manus imposuit*, to put *B.* out of his corn, for which *B.* brings assault and battery, *A.* may plead *quod possessionatus fuit*, &c. and that he *molliter manus imposuit* to put *C.* out of his corn, and it is good, without setting forth a title. He said, this was like the principal case, for the action is transitory, and cannot be made local but by a *clausum fregit*: Indeed in an avowry, a title must be shewn, but that is not like this case. *Powis* and *Gould* of the same opinion. And judgment for the defendant.

In trespass for taking cattle, defendant pleads *possessionatus*, held good *sans* shewing his title.
2 Salk. 643.
Holt 23.
Fortesc. 255.
S. C. and see
2 Mod. 70.
3 Mod. 132.
10 Mod. 37.
12 Mod. 507.
and 3 Will.
21. S. P.
* P. 220.

Cro. Car. 138.
3 Will. 173.

Title to be shewn in avowry.
Yelv. 148.
1 Brownl.
213.
Gilb. Distr.
190.

Anonymous.

(11.) **A**CTION upon the case for words spoke of one who went about the country to collect charity for a loss by fire; the words were, *He fired his house*, (*innuendo* voluntarily) *He was brought up to rook and cheat the country, and since he has fired his house, he has cheated it more and more*; per quod he lost much charity, which otherwise he would have had; after trial, and verdict for the plaintiff, it was moved in arrest of judgment, by Mr. Page, that the action did not lie.

Words, of a collector of a charity. But if a special damage had been laid in the declaration, and proved on the trial, the plaintiff And would have

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been intitled
to a verdict.
1 Roll. Abr.
34, 35.
But, at this
day, the law
is otherwise
settled, by
9 G. 1. c. 22.
* P. 221.

And the court was of the same opinion. For the *innuendo* did not supply the place of *voluntarily*, which must be proved to make him criminal; and suppose it had been said voluntarily, yet the action would not lie; * for it is not felony, unless it be with intent to fire his neighbour's house; and tho' the words are taken in *malam partem*, yet they are not actionable.

Also *Powell* said, It was unlawful for people to go about the country and collect charity, unless they have letters patents. And *per Holt Ch. J.* To say a man is an *errant knave, rogue, or rascal*, is not actionable. *Judgment arrested.*

Kid *versus* Dr. Watkinson.

Mandamus for
a parish clerk.
Holt 599.
1 Str. 59.
Say. Rep.
159, 176.

(12.) **A** *Mandamus* was granted to restore a parish clerk, he being elected by the parishioners, and displaced by the parson.

Tutty *versus* Alewin.

Words of an
apothecary.
Sav. 126.
1 Vent. 21.
1 Roll. Abr.
71.

(13.) **A**CTION on the case for words was brought by an apothecary; the words were, *It is a world of blood he has to answer for in this town, through his ignorance, he did kill a woman and two children at Southampton; he did kill John Prior at Petersfield, (and in another place the defendant said, he was the death of John Prior); he has killed his patient with physick; ubi revera, they died of the visitation of God,* adjudged that the action lies.

Books cited were *Cro. Eliz.* 620. 2 *Anderson* 268. *Sutor* and *Emett*, 2 *Roll Rep.* *Cro. Jac.* 206. *Hetty* 69. 1 *Cro.* 270. *Sir Tho. Jones* 141.

Anonymous.

Prohibition
against prov-
ing a will.
1 Mod. 211,
212.
1 Rol. Abr.
608.
but see *Moor*
340.
2 And. 92.

(14.) **S**ERJ. *Banister* moved for a prohibition to the Spiritual Court, to prohibit them proving a will made by a feme covert, without her husband's consent.

Holt said, A feme covert cannot devise what she has as executrix without the husband's consent. And the motion was granted *nisi* this term, and made absolute in *Trin.* term following.

* P. 222.

Queen *versus* Grantham.

Indictment
for cheating
by a false
pretence, lies
not. 2.

(15.) **M**R. *Dee* moved in arrest of judgment, upon an indictment against the defendant for coming in the name of *Jones* and borrowing money, and promised that *Jones* would repay

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repay it; *ubi revera*, Jones never sent her, of which she was found guilty.

He said, that an indictment would not lie, for she brought no tokens with her.

Mr. Bains cited the case of the *Queen versus Jones, Hill.* 2d of the Queen which was exactly the same case, and the indictment was quashed, tho' there was a token brought.

Holt Ch. J. said, he remembered a case 1 *Lev.* 169. 1 *Sid.* 258. where a lusty fellow came to a shop to buy goods, and upon his affirming that he was of age, the shop-keeper trusted him; after, upon his refusing to pay for the goods, the shop-keeper brought an *indeb. assump.*, to which he pleaded that he was not of age; upon that, the shop-keeper brought an action *on the case for the deceit*, and upon motion in arrest of judgment, it was adjudged, that the action did well lie, for else non-age would have a privilege of cheating; But if an action will not lie for the fraud, certainly an indictment will not lie. *Q.*

The court offered, that it might be spoke to again. But Mr. Raymond, who was for the Queen, seemed satisfied that the indictment did not lie; he said, he remembered the case cited by Mr. Bains.

Holt 354.
S. C.
2 Ld. Raym.
1013.
1 Salk. 379.

Queen versus Inhabitants of Puttenham.

(16.) **A** Motion was made to quash an order of sessions; the exception taken was, That it did not appear that there was any complaint of the overseers, only *A. B. &c. quorum unus*, do order, &c.

* *Per cur.* The justices have no power but upon complaint of the overseers, for which reason the order was quashed. Also the like order of sessions *inter the Queen and Inhabitants of Crediton*, was quashed for the same reason.

Poor's provision, justices cannot order, but on complaint of overseers.

* P. 223.

Anonymous.

(17.) **A.** And B. being joint merchants, have goods jointly between them, A. delivers the whole to C. in trust for his executors, and dies, and C. delivers them to the executors accordingly; B. as survivor brings trover against C. The court held, that there is no survivor in merchandize, but an account given by the statute; and C. having performed his trust is discharged, so that the action should be brought against the executor.

No survivorship between joint merchants.

1 Ld. Raym.

340.

2 Salk. 444.

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Buston *versus* Ridley.

Recogni-
zance a re-
cord, &c.
2 Salk. 564.
600, 654.
6 Mod. 42.
Holt 612.

Administra-
tion where
bona notabilia, &c.

* P. 224.

Recogni-
zance a re-
cord where
taken, and
local.

(18.) **I**N ejectment, *R. Bradbourn* being seised in fee, in 1658, enters into a recognizance before *J. Glynn*, then Ch. J. of the Common Pleas. Then a recital of the process out of Chancery upon the statute of *H. 8.* and an extent out of Chancery thereupon. Two administrations were granted, one out of *Durham*, the other out of *London*. *Sir Edward Northey* urged, There was no such recognizance; for *J. Glynn* (he said) never was Chief Justice.

Per cur', Where a man has *bona notabilia* in two provinces, there must be a double administration. But where a man has *bona notabilia* in one province, and *goods only* in one diocese in another province, there the archbishop's prerogative takes place. (*Quare*, of goods only in one diocese in the same province?) And so if there be not *bona notabilia* in both provinces, the archbishop of the province, where the *bona notabilia* are, shall grant the administration. See 3 *Cro.* 305. A recognizance is a record * but inferior to a judgement. (*Note*, *Holt* Ch. J. called it a *pocket-record*.)

Serjeant Cheshire. *Non constat* that this recognizance was ever enrolled, and that 'twas only ambulatory; and then the person that intitles himself to it must take out administration where 'twas found; but a record in one place is a record in all, &c. and they have not shewed where this recognizance was found. And because it was acknowledged, it is not therefore necessarily to be presumed to be enrolled: For tho' there is an officer appointed to enroll it, yet he may have neglected doing it, and for such neglect a penalty is appointed by the statute.

Holt Ch. J. The statute, *i.e.* the recognizance, is ambulatory, and is not certified into the Chancery till the extent. *Powell* J. If it appears to be taken at a Judge's chamber in *Fleet-street*, &c. it makes it local. *Quod fuit concessum*. And yet he held it to be a record, upon the taking of it, before the enrolment; and said, that the enrolment was by a statute in Queen *Elizabeth's* time. And the court seemed to agree, that 'tis a record where 'tis taken, and so local. *Sed adjornatur*.

At the Sittings at Guild-hall, before *Holt* Ch. J.

Anonymous.

Evidence.
The wife in
an assault on
herself.
Tamen quare;

(19.) **I**N an action of assault and battery brought by the husband against the defendant for an intent to ravish his wife, she was admitted an evidence, which, *Holt* said, was because the wife cannot

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cannot give any consent, tho' it be not felony. *Holt* held, that *A.* having laid 5*l.* of the event of the cause, was no objection to the wife of *A.* being admitted to be an evidence; because it shall not be in the power of a third person to disqualify one, who otherwise would be a good evidence; and thereupon she was admitted to give evidence.

for in action of crim. con. the wife is not a competent witness, nor will her confession be admitted, against the defendant.

Baker and Morly, Guildhall, 1739. As to the wager, see *Skin.* 586. Str. 652.

* At the Sittings at *Westminster*, before *Holt* Ch. J. * P. 225.

Brown versus The Corporation of London.

(20.) UPON issue joined upon a prescription for toll, the defendant produced a witness; the plaintiff objected, that he was a freeman and so interested; upon which the defendants produce a judgment in the Mayor's Court, where upon a *scire facias* awarded, and two *nibils* returned, they had given judgment of his disfranchisement: But upon inquiry, the man said, he never was summoned, and knew nothing of his disfranchisement; therefore the proceeding being irregular, *Holt* would not admit the man to be an evidence, because the judgment in the Mayor's Court may be avoided.

Evidence of one irregularly disfranchised refused.

1 Vern. 254.

2 Vern. 317.

But one, who

had released

all his right

to the corpora-

tion, was

held to be a

good witness.

2 Jon. 116.

2 Lev. 236.

In this case it was likewise said *per Holt*, That a man who uses a way may be an evidence whether a toll has been paid; and so in case of a nuisance; but if he contributes any thing towards the carrying on of the suit, he cannot be an evidence.

Evidence of toll by the payer.

Anonymous.

(21.) ACTION of debt upon a bond against an executor, who pleads *plene administravit*; the plaintiff's counsel gave into court the inventory taken in the Spiritual Court, and put it upon the defendant to discharge himself.

Evidence, in-

ventory, des-

perate debts.

1 Salk. 296.

1 Barnes 240.

Holt said, that where in the inventory it was set down desperate debts, those shall not be assets, unless the plaintiff can prove that the defendant has received them. But those debts which are not set down desperate, whether arrears of rent, or any other, shall be accounted assets, whether paid or not.

At

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* P. 226. * At the Sittings at Guildhall, holden before *Holt* Ch. J.

Garnet versus Clarke.

Promise to
pay on ac-
count of his
mother.

3 Burr. 1886,
5c.

(22.) *ASSUMPSIT* upon a promissory note, whereby the defendant promised to pay so much upon account of his mother; and it being objected, that there was no consideration to it,

Holt said, that to promise to pay to *J. S.* is good; but to promise to pay to *J. S.* upon account of *J. N.* is not good, for that is not within the words or meaning of the act; the consideration implied in the act is, that when the party promises upon his own account, it must be presumed he is indebted, or else he would not promise to pay it; *aliter* where the promise is to pay upon account of a third person.

In this case *Holt* directed a verdict for the plaintiff, but under control, and ordered the *posse* to be paid.

Mason versus Hogden.

A factor may
be evidence.

(23.) *HOLT* said, that barely being a factor does not incapacitate a man from being an evidence in a cause; otherwise if he be interested.

* P. 227.

* Trin. Term, 1709.

8 Annæ Reginae in B. R.

Holt Ch. J.
Pecock, Powis
and *Gould*.

Indictment
for refusing
to take the
office of high
constable,
tho' elected.

Vide ante,

215.

2 Salk. 502.

Holt 152.

Queen versus Jennings.

(1.) **T**HIS term, Mr. *Raymond* moved to quash an indictment against the defendant, for refusing to take upon him the office of a high constable, *licet debito legali modo electus*, (not saying to what,) at a court-leet held for the hundred of *Farnham*, 16 Sept.

The

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The exceptions he took were,

1. That it was not said to what he was elected, only *licet debito & legali modo electus, &c. sed non allocatur*. For *per cur'*, it shall be presumed that it was a *high constable*.

2. It is said, *Electus fuit* at a court-leet held 16 Sept. Now *Magna Charta*, c. 5. enacts, That all leets shall not be held *nisi bis in anno*, once within a month after *Easter*, and the other within a month after *Michaelmas*, and this court is said to be held 16 Sept. and they have not laid any prescription to hold it at that time, contrary to the statute. 3 *Keb.* 192, 230, 255. R—— v. *Barnard*, 8 *W.* 3. *Deekin's case*, 2 *Saund.*

Sir *Edward Northey* said, That so it was in the case of the *K—— v. King*, but there the court held the indictment good notwithstanding. To which *Raymond* answered, that the reason of that case was, because by the pleading over they had admitted it, but here we have pleaded not guilty. To which *Holt Ch. J.* said, that an admittance, by pleading to an indictment, does not make the indictment good, as it would a declaration.

Admittance, by pleading to an indictment does not make an indictment good.

* Sir *Edward Northey* likewise said, that one may prescribe to hold a court-leet at another time than is named in *Magna Charta*; and it shall be presumed that this was so. To which *Holt Ch. J.* and the court answered, that indeed one may prescribe so, but unless that prescription appear, it shall not be presumed. Also, when a presentment in a leet is removed by *certiorari*, the stile of the court must be set out exactly, but there needs no such nicety in pleading. 2 *Cro.* 43. *King v. Hill*; And the indictment was quashed. * P. 228.

One may prescribe to hold a leet at another time than a month after *Easter* and *Michaelmas*.

Young *versus* Slaughterford.

(2.) **A**T a trial at bar in an appeal of murder; in this cause *Holt Ch. J.* said, to which the rest did not dissent, that it was a good cause of challenge by the appellee, to one of the jury, that he was one of the grand jury who found the bill against the appellee, upon which he was indicted at *Kingston* assises. Also that the being of the coroner's inquest, is good cause of challenge by the appellee.

Ante 217. Appeal of murder. Being upon the grand jury who found the bill, is good cause of challenge for a jury-Inquest.

Also being uncle to the appellee, good cause of challenge by the appellant. But the appellee denying him to be any relation, the court directed it to be tried on a *voir dire*.

Being uncle to the appellee, good cause of challenge for the appellant.

One being produced to be an evidence against the appellee, who was under twelve years of age, and the appellee's counsel objecting to him for that reason; and besides, they said he had taken money.

One under 12 may be evidence, if he knows the danger of an oath.

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A witness having taken money, does not incapacitate him from giving his evidence; but the jury may

Holt Ch. J. said, that if he knew the danger of an oath, he might be an evidence; and that appearing, he was admitted. And suppose he had taken money, that is no reason why his evidence shall not be taken: But if it be proved, the jury may give the less credit to his evidence. *Str.* 700.

Otherwise if he take money upon the event of the cause.

But suppose one gives or promises a witness money if the cause go on that side, he cannot be admitted to give evidence. *Skin.* 586.

* P. 229.

* Sir Peter King objected, that in an indictment evidence of discourse preceding the fact, is not to be given.

But *Holt* said, that they might give in evidence any thing that explains the fact.

Motion in arrest of judgment, on an appeal of murder.

The appellee being found guilty of the murder, came afterwards to receive the judgment of the court; and being arraigned, and asked what he had to say why judgment should not be given:

Mr. *Eyre*, Solicitor General, moved in arrest of judgment, that the appeal was not good; and took his exceptions to it.

2 Hawk. P. C. 180, &c.

1. That there are two places mentioned in the appeal, viz. That he was commorant at *Shalford*, and that the fact was done at *Compton*; afterwards it says, *die, anno, hora & loco præd' eandem Jane Young percussit.*

2. There is no venue laid to the assault; for it is said, that the deceased being at *Compton*, &c. *venit præd' Christop' Slaughterford felonice, voluntarie & ex malitia sua præcogitata ut felo dictæ dominæ reginæ nunc, ac contra pacem, &c. die & hora præd' apud Compton præd' in com' Surry, vi & armis, &c. ac in super eandem Jane Young, in pace Dei & dictæ dominæ reginæ ut præfertur existen' felonice, voluntarie & ex malitia sua præcogitata insultum fecit;* so that the venue is only laid to the *venit vi & armis*, for the *ac* separates the sentence; and if an assault be necessary, it is necessary to lay a venue, for it is traversable; it should have been *tunc & ibidem insultum fecit.*

At first *Holt Cap' Just'*, *Powis* and *Gould* Justices, were clear, that neither exception was good, but *Powell* doubted; and the matter being put off to the next day,

No need of an assault to be laid, if there is *percussit*, for that implies an assault.

Holt Cap' Just', was of opinion, that neither exception was material; as to the first, when one place is the man's addition, the other the fact, certainly *die, hora & loco præd'* shall refer to the place of the fact; and it is as well as if it had been *eodem*, for the place of the fact is the last before the *præd'*.

As to the other exception, it is not material, for the assault is not necessary, for *percussit* is a sufficient assault; as to *Long's* case, where *percussit* was omitted, that was * shewing the consequence without the cause; *percussit* implies an assault, but if it did not, here

* P. 230.

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here it is said, *Venit vi & armis* to Compton, *ac insultum fecit, &c. ac cum quodam baculo, &c. percussit*, dans eidem J. Y. unum mortale vulnus, de quo quidem vulnere instanter obiit; so that if the assault was necessary in the venue here it would be sufficiently set forth.

Powell said, as to the first exception, the precedents are *die, hora & loco præd.* But in an appeal there needs no addition, for it is not within the stat. of additions; and it being said *apud Compton instanter obiit*, ties down the stroke to the place of the death.

As to the second he said, that *dedit mortale vulnus* would be bad. But in this case, there cannot be a stroke without an assault.

The old precedents are *insidiando & ex insultu*. But upon the petition of the clergy, because it took away the benefit of the clergy, in H. 6. time it was left out, and afterwards it was only *ex insultu*. In *Burgh* and *Holdcroft's* case, there is no assault laid, and indeed where there is *percussit*, as in this case, there needs none.

Powis and *Gould* the same.

Then Sir Peter King said, there was a variance between the *venire* and *disfringas*, for the addition of one of the jury is *de Chidington*, and *Chedington* in the *disfringas*; and he said, it was like *Palus* for *Paulus*, or *Constantanus* for *Constantinus*: But it appearing that that man was challenged by the appellee, the court disallowed the exception; and judgment was given *quod suspendetur per collum*; and Powell gave the sentence: And the court ordered a rule to the sheriff of *Sarry* to receive the body.

Variance between the *venire* and *disfringas*.

Smith versus Bowen.

(3.) THE appellee *Bowen* having demurred to the appeal, Appeal of murder. Mr. Pengelly took exceptions to it. Amendment of the appeal. Ante 216. Post 254.

1. That the murder is laid to be done *post meridiem circa decimam horam ejusdem diei*; and if the murder be * in the night, by the statute of Gloucester, cap. 9. it must be pleaded in *nocte ejusdem diei*; and tho' in July it be not dark at ten, yet it must be so pleaded. To which it was answered by

Holt Ch. J. That in murder this is sufficient; but in an indictment for burglary, it would have been bad; for there it must needs be said *in nocte, &c.* because it is not burglary unless it be in the night.

2. It does not say, the assault was *vi & armis*, only *venit vi & armis & insultum fecit*; and cited *Wilson* versus *Laws*, 4 Mod.

3. There is no place set forth where the stroke was given; for it is said *die & loco præd' insult' fecit*; now before it is mentioned where the pledges lived, and afterwards where *venit vi & armis*;

* P. 231.

NOW

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now *præd'* may refer to the place afore-mentioned, *viz.* where the pledges lived; so that there is no *venue* laid to the assault.

4. In the appeal it is *murdam* for *murdrum*, and *Georius* for *Georgius*. But upon examination of the bill that was filed, it was right. Then the appellant's counsel moved, that the roll might be amended by the bill, which the appellee's counsel opposed, and said, that none of the statutes for amendments extend to appeals; and cited *Tuchin's case*, and *Hoyl versus Pitt*. See 6 *Mod.* 104, 268.

As to the above exceptions; *Holt* said, that the *vi & armis* shall extend to all, and not only to the *venit*. *Vide Co. Ent.* 59. And this is not like the case of battery or trespass, for there is a fine due to the Queen.

As to the 3d exception, that *præd'* is good, for the place mentioned where the pledges live, is not part of the appeal.

As to the 4th exception, that he thought there needed no amendment; but if there does, it may be amended. Suppose in an action of trespass, there is an omission of *vi & armis* in the *Narr'*, and the original is right, the declaration may be amended by it. But as to the mistake of *Georius* for *Georgius*, it is in the fresh suit, which, since the statute of *Gloucester*, need not be set forth; for if an appeal be prosecuted within a year and a day, 'tis sufficient. * But he said there was a mistake in awarding the *venire*; for it is by *cesset processus*, but he thought the right way was by *vicecomes non misit breve*. As to the amendment, *Powell* said, that by the common law the roll might be amended by the bill, and cited 7 *H.* 4. 27. and *Brook tit. Amendment* 101. where an appeal was amended. But the original in appeal is not amendable. 8 *Co.* 156.

* P. 232.
Ante 56.

Powis and *Gould* of the same opinion. But, upon the objection started by *Holt*, the matter was put off to the next day.

When *Mr. Pengelly* for the appellee argued, that in this case there was a discontinuance of the issue; for it is entered *quoad triand' exitum præd' cesset processus*, &c. whereas the *venire* should have been continued by a *vicecomes non misit breve*.

Mr. Whitacre cont. said, it was held well in the case of *Armstrong versus Lisle*; to which *Mr. Raymond* answered, that in that case there was judgment for the defendant before demurrer, so that a *cesset exitum* was sufficient.

Mr. Eyre said, that this was a discontinuance; for here is a *dies datus* to the demurrer, and a *cesset processus* to the issue, until the demurrer be determined; and the precedents are otherwise, and cited *Rast.* 341, 555, 667. *Co. Ent.* 141, 476, 493, 59. *Rast.* 49. *Egerton versus Morton*, 1 *Bulstrode* 69.

Lutwyche cont. said, that an appeal differed from a civil action; for here one may demur to the whole, and likewise take issue to the whole; but not in a civil action, and all the precedents cited

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are of civil actions. But in the case of an appeal, where there are two pleas to the whole, 'tis better with a *cesset processus* to the *venire*, because there will be no need of a *venire*, if the demurrer be adjudged for the defendant; but 'tis good either way; and in *Co. Ent.* 59. *Bulstrode* 69. 'tis adjudged in point.

Mr. *Eyre* Solicitor General replied, that in those cases there was judgment for the defendant. To which *Holt* answered, that tho' there was judgment for the defendant in those cases, yet the entry of a *cesset processus* was not the cause of it, for if there was a discontinuance, the * court could have given no judgment at all. If a *quare impedit* be brought against three, two plead in abatement, and the other in bar, and judgment is given for the plaintiff as to the two; then it must be entered, but there must be a *cesset executio*; and if judgment be given for the third defendant, and a verdict for the plaintiff, then the *cesset executio* will be continued as to the other two. * P. 233.

The court gave their opinion as follows:

Holt Ch. J. said, that, upon consideration, they were of opinion, that this is the most proper way; for it is in vain to proceed to issue, until the demurrer be determined; for if the bill abate there is an end.

As to the amending the appeal by the original bill, it is amendable at common law; but if not, yet 'tis by 14 *Ed.* 3. c. 6. and cited † *Blackmoor's* case; for appeals are not excepted out of that statute. 1. Appeal where amendable. † 8 Co. 156.

It was doubted, whether a plea might be amended after judgment upon error; and that was upon the word *process*, which was thought did not extend to any plea after judgment upon error; to amend which the stat. 9 *H.* 5. c. 4. was made, which it did by adding the word *record*, and the stat. 4 *H.* 6. c. 3. made that perpetual. In none of which statutes appeals are excepted; the stat. 8 *H.* 6. enlarges the power of the judges; but in this appeals are excepted; he cited the case of *Sir H. Tufton* versus *Sir John Ashby*, *Cro. Car.* 144. An amendment in a *quo warranto*, and concluded, that it should be amended; for the aforesaid statutes extend to appeals, where by the record it self it appears to be a mistake of the clerk.

Powell said, there were very few things that were amendable at common law; a misprision of a clerk was not, if there was nothing to amend it by; but this is amending one part of the roll by the other, *viz.* the recital by the bill; in this case the bill is *verbatim* the same as the count; but in most cases it is otherwise.

As to the statutes, I see no reason why an appeal, which is a civil process, is not within them, where it is not excepted. But I ground my opinion upon the common law.

* As to the discontinuance, I think one way is as good as the other; without the order of the court, it would be a discontinuance. * P. 234.

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ance. But we have power to stay the issue until after the demurrer; and this appears to be so by the entry, *viz. cesset processus quousq. eadem materia in lege aliquo legitimo modo terminetur*; and that this way is usual as well as the other, the precedents cited shew.

Powis and Gould idem, pro eadem ratione.

And the court ordered, that the roll should be amended.

Mascal *versus* Davys.

Motion on the inlifting act, to be discharged out of execution, denied. *Vide post*, p. 252.
2 Vern. 697.
2 Ld. Raym. 1246.
1 Str. 7.
Barnes 4to ed. 432.

(4.) **A** Motion was made to discharge one who was a prisoner, upon the act of parliament for lifting: The case was, There was a trial, and, after verdict for the plaintiff, the defendant lifted himself; and *Hucks's* case last term was cited, where one was discharged upon an *excommunicato capiendo*, he being so inlifted.

Holt Ch. J. said, he was never of opinion, that executions were within the act, though the Judges of C. B. were of that opinion. But there appearing to be fraud in this case, the defendant could not be discharged, though it had been upon mesne process, much less on an execution.

The Duke of Richmond *versus* Costelow.

Venue not to be changed in *scandalum magnatum*, but upon special cause.
2 Salk. 668.

(5.) **S**IR *Peter King* moved to change a *venue* in an action of *scandalum magnatum*; and cited Lord *Shaftsbury's* case.

Holt Ch. J. said, the reason in Lord *Shaftsbury's* case was, because he had an interest in the city, and therefore he could not have an impartial jury there; and where there is a special cause, it is in the discretion of the court, whether they will do it or not. But it is not usual to grant it upon the common affidavit.

* P. 235.

* Sir *Peter King* said, that this action is given by the statute of *Rich. 2.* and that imposes a fine for the contempt to the crown; and the late act of pardon dispenses with that. To which *Holt* answered, that it did not pardon the private offence; and the court refused to change the *venue*.

Anonymous!

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Anonymous.

(6.) **M**R. Serjeant *Dee* moved to discharge one upon common bail, upon the lifting act: The case was, one was lifted into the queen's service, served some time, and afterwards was discharged, upon his finding another able-bodied man, who is now in the army. The question was, Whether the clause in the act, *or find another able-bodied man*, shall refer to the time of his lifting before a justice of the peace? Or, whether any time afterwards will do, provided the man whom he finds continues in the service.

The court were of opinion, that the latter was sufficient; and thereupon the man was discharged.

Finding an able man any time after lifting, sufficient to entitle to the benefit of the lifting act, if the man continues in the service.

Ante 191. et vide post 252. and the authorities there cited.

Queen *versus* Baker & al'.

(7.) **S**IR *Edward Northey* moved to quash a conviction of forcible entry, because there wanted *manu forti intravit*; upon reading the conviction it was *vi et armis intravit*, which the court said was bad; for it might be *vi et armis*, and not *manu forti*, which are the words of the statute. *Ideo* quashed.

Conviction of forcible entry quashed for want of *manu forti*.

Cro. El. 461.

Queen *versus* Tyrrell and Barber.

(8.) **A**N information in the nature of a *quo warranto*, judgment *per nihil dicit*, and a *capiatur pro fine*; the question was, Whether this was pardoned by the late act? * This cause was spoken to in *Easter* term; and this term *Holt Cap' Just* delivered his opinion, That an interlocutory judgment is not within the exception in the act; for by a judgment is meant a final judgment, it being coupled with sentence and decree; and a *capiatur pro fine* is only to bring them in to receive the judgment of the court. But this being a matter of right, *viz.* in a *quo warranto*, tho' the fine be pardoned, yet the continuance of the crime is not: And he said, he remembered a case upon the act of pardon in king *William's* time, where the fine for a nuisance was pardoned, but not the continuance of the nuisance. He said likewise, that where writs of error say *si judicium inde redditum sit*, it extends only to final judgments; and so does the exception in the act of parliament.

Powell, Powis and *Gould* were of the same opinion; wherefore judgment was given, that the defendant should be ousted of his office, for committing the offence; but that the fine is pardoned.

* P. 236.

Information in nature of *quo warranto*, judgment *per nihil dicit*, and a *capiatur pro fine*; the fine is pardoned by the late act, but not the offence to a private person.

See the 9 Anne, c. 20.

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Queen *versus* Layton.

Judgment in a conviction of forcible entry may be entered by *quod finis imponatur*, or *ideo consideratum*; if the former, 'tis removeable by *certiorari*; if the latter, by writ of error.

Ante 46, 59.
2 Salk. 450.

* P. 237.

(9.) **A** CONVICTION of forcible entry removed by *certiorari*, and the judgment given upon the conviction was, *quod finis imponatur*, &c. and the question was, Whether the fine should be entered so, or *ideo consideratum est*? The court held either way was good, there being precedents both ways.

If the entry be *quod finis imponatur*, then it is removeable by *certiorari*; if *ideo consideratum*, then by writ of error; they cited *Gressy's case*, 10 Co. K. v. *Candler*, 1 *Keble*. 1 *Siderf*.

The court gave judgment on the *certiorari*, that the conviction should be affirmed.

* *Rice versus Wilmer*.

If the defendant will bring on a trial by *proviso*, he must give the plaintiff a rule of notice.

Reg. Mich. 4 Ann. (c.)

(10.) **I**F the defendant will bring on a trial by *proviso*, he must first give the plaintiff a rule of notice; or else, if the defendant be nonsuit, such nonsuit will be set aside as irregular.

Dillingham *versus* Gately.

False *Latin* will vitiate a writ, unless where the writ sets forth the whole case, as in an action upon the case. Morg. Dig. 190. S. C. et seq.

(11.) **A**N action upon the case upon a promissory note, and a demurrer for false *Latin* in the original, which was *locarent ad competum* for *locaret*, &c.

Mr. *Raymond* for the plaintiff said, that false *Latin*, if immaterial, shall not abate a writ.

Per cur'. In an action upon the case, the original sets out the whole matter, so that the original is as the bill; and therefore false *Latin* shall not vitiate it: But if it had been in a writ, for which there is an exact form in the register, then it would be bad. Judgment *respond' ouster*.

Collins *versus* Delafountain.

In an action by an assignee of a sheriff's bond, 'tis sufficient to say, that the bond was for the defendant's appearance. But vide ante 170. And Mod. Caf. 78. *Tucker v. Goldburne*.

(12.) **I**N this case *Holt Ch. Just.* said, that upon an action by an assignee of a sheriff's bond, 'tis enough to set forth, that the bond was *pro comparentia* of the defendant; and there is no need of setting out the matter at large.

But vide ante 170. And Mod. Caf. 78. *Tucker v. Goldburne*.

Hopwood

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Hopwood *versus* Barefoot.

(13.) **I**N a trial before *Holt Cap' Just'*, in an action of covenant, this case was reserved for the opinion of the court: A building lease was made in 1672 by * *Andrew Collins*, for 61 years, in which there was this covenant, (that the lessee should pay all sum and sums of money that now is, or shall be assessed or taxed for and in respect of the premises demised as aforesaid, for chimney-money, church and poor, or visited houses, or otherwise, above and besides the rent reserved thereupon;) in 1698, the lessee surrenders this lease, and a new lease was made upon the foot of the former, in which there was the same covenant as in the former lease.

After several arguments at bar, the court this term gave their opinion *seriatim*, viz.

Gould Just. said, that the only question was, Whether, upon the wording of the covenant, the lessee should pay the land-tax? He said, that the words, *or otherwise*, make it a charge upon the tenant, for they must have some intent; and this seems to be the plain intent of the parties: These two indentures refer one to the other; the tax of royal aid had been before the covenant was made, so was chimney-money, tho' determined at the time of making the second lease, and yet it was put in. It was objected in the archbishop of *Canterbury's* case, 10 Co. 46. (where the question was, whether lands belonging to the college of *Maidstone*, should be exempt from paying tithes;) that by the statute 31 H. 8. the words of which are, *all monasteries, colleges, &c. which shall come to the king by dissolution, or any other means*, should be exempt from paying tithes; that this coming to the king by act of parliament, was not within that statute. But it was there held, that the college being given to the king by the stat. 1 Ed. 6. and an act of parliament being of a superior nature to all other conveyances, it is not within the general words of the statute of 31 H. 8. *by dissolution, or any other means*. Likewise where the statute 13 Eliz. c. 10. speaks of *deans and chapters, colleges, parsons, vicars or others, having spiritual promotions*; it was resolved, that these words did not extend to *bishops, causa qua supra*.

To which he (*i. e. Gould*) answered, that the statute of *Marlbridge*, c. 19. 2 Inst. 137. provides that essoins shall be admitted without oath, *in curia baronis vel aliis curiis*, and * yet 'tis held, * P. 239. that these general words extend to the courts in *Westminster-hall*. *Ideo* he was of opinion for the plaintiff.

Powis the same for the plaintiff.

* P. 238.
Where public taxes shall be paid by the lessee or lessor. See the case of the countess of Arran v. Crispe, 1 Salk. 221. Holt 549. and also the case of Brewster and Kitchen. 1 Ld. Raym. 317. 1 Salk. 198. 2 Salk. 615. 5 Mod. 368. 12 Mod. 166. Carth. 438. and Comb. 424, 466.

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Powell Just. said, that this covenant extends to the land-tax; but he did not think it would extend to all taxes *in futuro*. In leases, taxes are distinguished into ordinary, which relate to poor, church, &c. and extraordinary, to those imposed by parliament; and so the words, *or otherwise*, would not extend to taxes of another nature, imposed by parliament. They lay great weight upon the archbishop of *Canterbury's* case, but he did not make any difference between persons and things; and the reason of the construction upon the statute 43 *Eliz. c. 10.* is not upon the difference between persons and things, but because they are not religious persons. If a tax be given by parliament, which was never known or *in esse* before, these words in the covenant would not extend to such taxes: But if it had been worded thus, *all taxes that should be hereafter imposed by parliament*, all taxes whatsoever would be included.

As to the second lease, tho' it be said that the intent thereof must be construed by the first lease, in that I do not agree; for we must take notice of the taxes that were usual at the time of making the second lease.

There are three sorts of taxes: 1. *Tents and fifteenths*, which are upon goods; and were uncertain until 8 *Ed. 3.* This continued until the time of queen *Eliz.* then came in *subsidies*; by which all men having such an estate, were taxed and called *subsidy-men*. In 1641 came in the land-tax; and to all these taxes the covenant will extend, but not to any of a different nature: And concluded for the plaintiff.

Holt Ch. Just. said, That taxes, which are for the benefit of the crown, and defence of the realm, cannot be imposed but by act of parliament; yet the crown has a right to ask them, upon any emergency, so they have a virtual existence, tho' no actual one. 13 *Ed. 4. 15, 16. a.* And this is not an extraordinary tax, but one always *in viris* (or *in usu*;) he cited a case 33 *H. 8.* and *Dyer 52. pl.* where the king granted a licence to export *bell-metal*, *non obstante* any act made or to be made; and afterwards an act was made prohibiting it; and the judges resolved, that the act repealed the king's grant; But the book says, that otherwise it had been in case of taxes. (*Memorand'. A quære* is entered in the book.) He said, that it was likewise adjudged, that where *A.* made a lease, and covenanted to discharge the lessee of all *burthens and charges*, (there being no tax at that time, but afterwards, a fifteenth being granted by parliament,) the tenant was distrained for it; and this was adjudged within the covenant; because taxes are always a charge *in viris*; and that that was a stronger case than this at bar. Because in the covenant there no taxes were named, as in this case. And tho' by the statute 4 *W. & M.* 'tis enacted, *That tenants shall pay the land-tax, and deduct it out of their rent*; yet that shall not destroy this covenant; as if tenant in tail before the statute 32 *H. 8.* had made

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made a lease for his own life only, and enters into a recognizance not to do more; then comes the statute 32 H. 8. which enables him to make a lease for three lives, or 21 years, yet 'twas held, that did not avoid the recognizance. If this covenant had been before 1642, it had not bound the tenant; because there had been no such tax before that time; and cited the case of *Brewster and Kidgell*, in the time of *Will. 3.* in point. He said, the reason why those special words in the stat. 13 *Eliz. deans and chapters, and others having spiritual promotion*, did not comprehend *bishops*, was, because they were provided for in the preceding act.

Simms *versus* Peters.

(14.) **M**R. *Eyre*, Solicitor-general, moved to quash a writ of error for a variance in setting out the record, the writ mentions only three defendants, whereas in the record in *C. B.* there were five.

* *Holt Cap' Just'* thought it well; because the rest being acquitted, there was no need to name them in the writ of error. *Powell* being of the contrary opinion, *adjournatur*. But afterwards, *absente Holt*, the writ was quashed *per cur'*.

Variance in-
ter writ of er-
ror and the
record.
Yelv. 209.
Carth. 7.
2 Ld. Raym.
1532. But
see Str. 683.
892.
3 Burr. 1792.
* P. 241.

At the Sittings at Guildhall, before Holt
Chief Justice.

Hall *versus* Ux' of William Gates, Executrix to her
Husband.

(15.) **I**N this case *Holt* said, that if a person receives a woman who runs away from her husband, and lays out money for her, the husband shall not be charged; because the wife was eloped. But if the wife continues to live with her husband, if she takes up necessary goods, tho' without the husband's consent, the husband is obliged to pay for them, unless he forbids people to trust her.

Husband not
obliged to pay
debts the
wife contracts
after elope-
ment.
1 Ld. Raym.
444.
6 Mod. 171.
1 Salk. 118,

119. *Holt* 102. The general rule is, that wherever the husband and wife live separate, the creditor of the wife is to be considered as standing in her place: Therefore, where the husband is not bound to make any allowance to his wife, as in this case of an elopement; or where he makes her a sufficient allowance; he is not liable, to her creditors, for any debts she may contract. *Per Earl Mansfield*, in the case of *Ogden v. Darnford*, at *nisi prius*.

Crifford

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Crifford *versus* Berry.

Indeb' assump'
lies not by C.
against B. for
money order-
ed by A. to
be paid by
B. to C.

1 Vent. 6.
But see id.
318, 322.
2 Jones 103.
and 2 Burr.
1008, &c.

(16.) **W**AGES are due to A. from the *East India* Company, he orders B. to receive the money, and pay it to C. to whom he is indebted; C. brings an *indeb' assumpsit* against B.

At the trial at *Guildhall*, *Holt* Ch. J. said, that the action could not be maintained by C. whereupon the plaintiff was nonsuit.

* P. 242.

* Mich. Term, 1709.

8 Annæ Reginae in B. R.

Queen *versus* Tooley, Arch and Lawfon.

Indictment
for murder
of *Dent*, a
constable.
Ld. Raym.
1296.
Holt 485.
S. C.
The late
judge Foster
(in his second
discourse of
homicide) has
questioned the
doctrine ad-
vanced in this
case; con-
ceiving that
it carries the
law, in fa-
vour of pri-
vate persons
officially in-
terposing,
farther than
sound reason,
founded in
the principles

(1.) **T**HE defendants were indicted at *Hicks's-Hall*, one as principal, and the other two as accessories, for the murder of *John Dent*, a constable; and being tried at the *Old Bailey*, the jury found a special verdict, as follows: That by a stat. made 27 *Eliz.* for the good government of *Westminster*, 'tis enacted, that, for reformation of disorders in that city, the dean, high steward, or his deputy, or two capital burgesses, may hear and punish incontinencies, according to the custom of *London*; that by the custom of *London*, any constable of any ward, parish or precinct, may execute his office throughout the whole city; that within the city, borough and liberty of *Westminster*, it has been used, that every person duly appointed constable of any parish, within the liberties of the city, borough and vill of *Westminster*, his office of constable in and through the whole city and borough of *Westminster*, and the liberties thereof, has executed and used to execute. That the 8th of *March*, 8 *Annæ reginae*, three commissioners, duly appointed by virtue of the act for the recruiting the army, for putting the act in execution, by virtue of that act, made a warrant under their hands and seals, directed to the constables of the

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the parish of *St. Margaret's Westminster*, within the said city of *Westminster*, thereby commanding the constables to make search within the said city and liberty for persons within the description of * that act; which warrant, after that day, was delivered to *Samuel Bray*, then and yet constable of the parish of *St. Margaret's*, to be executed; that after that day *Samuel Bray*, into the parish of *St. Paul's Covent-garden*, within the city and liberty of *Westminster*, to execute that warrant did come and was; that within the parish of *St. Paul's Covent-garden* there was and is a constable belonging to that parish; that *Bray* before had sent to *John Dent*, to assist him to execute that warrant; that after the said 8th of *March*, between eight and nine at night, at the said parish of *St. Paul's Covent-garden*, the said *Samuel Bray*, staying to execute that warrant, one *Anne Dekins*, in the street between the play-house and the *Rose* tavern, he then and there found, whom he suspected to be a disorderly person, and then and there as a disorderly person took into his custody, as constable of the city and liberty of *Westminster*, to carry her to prison for her safe custody; that *Ann Dekins* had been before taken up by *Bray*, as constable, as a disorderly person; that at her being taken up by *Bray* on the said 8th of *March*, she had not misbehaved herself; that *Bray* had no warrant to take her or detain her; that after the taking the said *Anne*, the prisoners, (*Bray* then having her in his custody,) in another place called *Covent-garden*, did meet, (they being all strangers to *Anne Dekins*) drew their swords and assaulted *Bray*, to rescue her from his custody; that *Bray* shewed his constable's staff, and declared he was about the queen's business, and intended the prisoners no harm; whereupon they put up their swords, and *Bray* carried the woman to the Round-house: That the prisoners, a little after, (the said *Anne* being in the said prison, in *Covent-garden* aforesaid,) drew their swords again, and assaulted the said *Bray* on account of the imprisonment of the said *Ann*, and to get her discharged: That *Bray* called some persons to his assistance, to keep her in custody and to defend himself from the violence of the prisoners; that *Dent* came to his assistance; that while *Dent* was in the constable's assistance, and before any stroke given, the prisoners gave *Dent* the mortal wound, in the indictment mentioned, * of * P. 244, which he died, as in the indictment; that the two others were aiding and assisting him that gave the stroke; but whether the defendants were guilty, &c. This special verdict being removed by *certiorari* in *B. R.* for the opinion of the court, Mr. *Raymond* argued for the queen, that 'twas murder; he said there were two points to be considered in the case.

1. Whether *Bray* was in the execution of his office, for then 'tis murder.

2. If not, yet still 'tis murder; because here was not a sufficient provocation.

* P. 243. of true policy, will warrant. Crown law 312. And in another place he says, that this doctrine is utterly inconsistent with the known rules of law, touching a sudden provocation in the case of homicide; and, which is of more importance, inconsistent with the principles upon which all civil government is founded, and must subsist. Ibid. 315.

* P. 244.

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1st Point.

As to the first point, he cited 9 Co. 66. 4 Co. 265. Constables may seize disorderly persons, and were officers at common law. 4 Inst. 265. 10 Ed. 4. 18. a. 5 H. 7. 7. b. 22 Ed. 4. 35. And not only disorderly persons, but suspicious persons; also 5 Ed. 3. 14. Lamb. Just. fol. 12. 13 H. 7. 11. a. And we must rely on these cases, because the special verdict only finds her to be a suspicious person; and it being found, that she was a suspicious person, *Bray* had authority to seize her.

Objection.

It will be objected to me, that he, being a constable of St. Margaret's, was out of his precinct when he took up *Anne Dekins* in St. Paul's, Covent-garden.

Answer.

To which it may be answered, that the stat. 27 Eliz. found in the special verdict, has relative words to the city of *London*; and by custom of that city, any constable within that city may exercise this authority throughout the city; and tho' constables are not named in the statute, yet other peace-officers being named, he shall be comprehended: As if a remedial law be made and but one person mentioned, yet it may extend to others; as the stat. *de circumspete agatis*; where the bishop of *Norwich* is only named, yet all other bishops are comprehended; and cited *Fitzb. Abr. tit. Prohibition. 2 Inst. 487. 1 R. 2. c. 12. Plowd. Com. 36. b.* 'Tis found, that they used to exercise their authority all over *Westminster*, tho' they have not said time out of mind; and tho' in pleading it should have been set forth, yet 'tis well as 'tis in a special verdict; and cited 2 Roll. 699. *Trin. 13 Car.*

* P. 245. *Alton v. Gnash.* His having a * warrant from the commissioners of the recruit act, does not hinder him seizing a disorderly person, in breach of the peace.

Objection.

It may be objected, that she was no disorderly person.

Answer.

To which it may be answered, that the constable having had her before in his custody, as a disorderly person, might well suspect her again, it being between eight and nine at night, and between the play-house and the *Rose* tavern.

2d Point.

As to the second point; supposing him not in the execution of his office, whether here was a sufficient provocation to make it manslaughter only? And he said it was not; for 'tis found, that *A. Dekins* being in custody, the prisoners all drew their swords and assaulted *Bray*, upon which he shewed his staff; and so, if there was no provocation, 'tis murder, for the law implies malice; and cited *Hale 45. 3 Inst. 52.* If *A. Dekins* had resisted herself, and killed the constable, it had been but manslaughter; otherwise, as in this case, where a stander-by kills the constable.

If speaking words, whereby a man may suffer damage in his reputation, shall never be a sufficient provocation to make it manslaughter, as in *Keil. 55.* much less a wrong done to a stranger; because not so great a provocation; so that in all cases there must be a proportion in the provocation; as if a man break my clove, and I with a stake beat his brains out, 'tis murder;

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der ; as was held in *Mawgridge's case*, *Keil.* 132. And there must be an open act of violence done to make it manslaughter.

He said, he expected *Hopkin Huggitt's case* would be cited against him ; but this case is different from that, for there they came civilly, and demanded a sight of the warrant ; but in this case, the very first act was an assault upon the constable ; their swords were drawn, and an actual fighting, which increases the provocation ; but here was an assault upon the person killed, before a blow given by those of his party ; there was no warrant, but here was a known person of the law : So upon these reasons he submitted it, 1. Whether he was in execution * of his office ? * P. 246.
2. If he was not, yet here was no sufficient provocation.

Mr. *Pengelly contra*, argued for the prisoners, that the constable was not a known officer ; for that no authority was given to constables by 27 *Eliz.* for that act is not universal, as the statute *de circumspēcte agatis*, or the statute of *Westm.* concerning the warden of the Fleet ; but only a particular jurisdiction given to particular persons, from whom the constable had no warrant ; but this warrant was given by the commissioners of the recruit act ; and tho' in *London*, the custom may give a jurisdiction to the constables to act all over the city, yet in *Westminster* there is no such custom. The special verdict finds, that such a custom has been used in *Westminster*, but does not say, time out of mind ; and the act of *Eliz.* being here found, makes it plain that they do not pretend to such a custom time out of mind. In *Hilary*, 11 *Will.* 3. *King v. Chandler*, 'tis settled, that a constable cannot go out of his precinct. But a justice of the peace, by his warrant, may appoint a constable, by name, to execute it any where within the jurisdiction of the justice of peace.

It does not appear, that they were appointed commissioners for this particular place or county ; but 'tis only said, they were duly appointed commissioners ; and by the act, the execution of their warrant is restrained to particular officers within the jurisdiction ; and in this case, there was a particular constable of *Covent-garden*, so that there was no failure of justice ; and therefore the constable here usurped an authority, and consequently was a trespasser to all people he took up. But suppose he was a lawful officer, yet that will not justify acting beyond his authority ; it does not appear that he acted under the recruit warrant ; and tho' *ex officio*, if he sees persons fighting, he may restrain them, or take up suspicious persons, yet the taking this woman is not lawful ; for she was very decent at the time, and therefore no cause of suspicion : But they should have found her to be a night-walker, as is usual in those cases. *Hern's Pleader* 392, 488, 489. 15 *Ed. 1. c. 4.* *Upper Bench Precedents* 218, 111, 522.

* Upon taking up a suspicious person, it must appear that there * P. 247.
was

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was just cause of suspicion, as a felony done; for the cause of suspicion is traversable. 12 Co. 92. *Stile* 166. 2 *Roll. Abr.* 56, 590, 559. 2 *Inst.* 52, 172. 3 *Inst.* 118, 221. 2 *Vent.* 22. *Bro. Commission*, pl. 3.

If the constable had no authority, he was in an actual breach of the peace, might be indicted, and is liable to all the consequences of it: But where the officer is killed in the execution of his office, no doubt 'tis murder. *Cro. Car.* 371, 537. *Jones* 429. *Hale* 56. 4 *Inst.* 333. But in this case, if *Bray* himself had been killed, it had not been murder, much less killing an assistant.

As to the provocation; 'tis found, that they did not see the first arrest; but they see her under restraint, and *Bray* was continuing the trespass; when they came up, they came to rescue the woman who was unduly restrained; and their seeing her under restraint takes off all implied malice; since 'tis not found, that they were upon an ill design, they cannot be supposed to have any previous malice.

There is in the statute of stabbing, *Jac.* 1. c. 8. a remarkable passage to this purpose. So in *Stile* 467. *Keil.* 136.

The constable, says *Mr. Raymond*, was about the queen's business. But they drew their swords, not imagining he had any such authority; and as to their trespass growing more and more outrageous. *Ans.* So did the provocation.

The point they went upon in *Hopkin Huggitt's* case was, upon the restraining the liberty of the subject; and tho' it was objected by *Mr. Raymond*, that there was fighting, yet that is not to the purpose; for in *Mawgridge's* case, the first act of violence being done by *Mawgridge*, it was held murder, notwithstanding the resistance that *Cope* made. *Keil.* 136.

If there was no original malice against *Bray*, there could be no derivative malice to *Dent*, who came to his assistance; for where there is no malice in the principal, it cannot egredere personam. *Hale* 150. *Dyer* 128. Countess of *Salisbury's* * case. * P. 248. *Plowden* 100. b. *Stile* 469. *Keil.* 65. *Thomson's* case. *Keil.* 87. 12 Co. 57. *Keil.* 115.

Upon arguing this case, *Holt C.J.* said, you have taken the stat. 15 *Ed.* 3. too largely; for certainly a suspicion barely conceived by the constable, is not sufficient, without some act of lewdness done: As to his having taken her up before, it does not appear that that was lawful. But whether it was or no, it would not justify his taking her up again; and tho' he was a constable, his staff does not give him a licence to do what he pleases; and if he is not in the execution of his office, but breaking the peace, then surely he may be resisted; and as for *Dent*, he assaulted her, and 'tis all a continuance of the same act; and tho' it be not lawful to rescue,

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rescue, yet certainly the taking her may be a provocation; and that is *Hopkin Huggit's* case.

Powell said, he would extend this act as far as he could to suppress vice. But taking it for granted, that the constable was within his jurisdiction, yet he could not justify taking up this woman. Whenever a constable may take up any person, it must be either for an actual breach of the peace, or upon grounds of suspicion; and the cause of his suspicion must be shewn, because 'tis traversable; and in case of suspicion, where there is a felony done, there is no difference between a publick and a private person: But when a constable has a warrant, he is tied up to that warrant, to act only as that directs; therefore *Bray* having taken up this woman, without any just cause of suspicion, she was illegally imprisoned; and therefore a provocation to all the people of *England*.

Powis and *Gould* of the same opinion.

This case was afterwards adjourned to Serjeants-Inn, for the opinion of the twelve judges; and upon arguing it, Mr. *Lutwych*, who was of council for the prisoners with Mr. *Pengelly*, spoke as follows: (a)

I agree, that if *Bray* had been a constable, having a lawful authority to act as constable in this matter, in the place where this fact was done, that it would have been murder; because the law implies malice in that case. And so is 9 Co. 68. *Mac-kally's* case, and 4 Co. *Young's* case. But the reasons there given for it shew, that where the officer exceeds and transgresses the bounds of his jurisdiction, it is quite otherwise: The reason given is, because they come by the authority of the law to keep the peace; and therefore, if any one oppose the justice of the realm, and kill an officer of justice, the law adjudges it as of malice: But where the officer exceeds his authority, the law is so far from favouring him, that he becomes a transgressor, and it punishes him for it. And therefore, the first thing I shall endeavour to make out is, that *Bray*, in this case, had no manner of authority to take up this *Ann Dekins*; and in doing that, I shall make two questions:

Argument of
Mr. Lut-
wych for the
prisoners.

1. Whether *Bray* had any authority to act as constable within the parish of *Covent-garden*?

2. If he had been the constable of *Covent-garden* himself, whether here was any lawful cause for imprisoning the woman?

As to the first, he could not act as constable within *Covent-garden*: The verdict finds the act of queen *Eliz.* and that they pretend gives the constables of *Westminster* the same jurisdiction as the custom of the city of *London*; and that is, to act over all *London*: But there is no ground for this by virtue of the statute; for by the words of it, all the authority that is given, is given

(a) This argument is now first published from the original MS.

only to the dean of *Westminster*, and the others *particularly* named, to hear determine and punish those *particular* offences there mentioned: And therefore, the constable cannot act without a warrant from them in this case; and if he had a warrant from them, the statute does not extend the jurisdiction of the constable any farther than it extended before. It would be a strange construction, if those general words should create a new jurisdiction, to all the inferior officers of justice.

It was objected, that this being a remedial law, ought to be extended to constables, though these were not named; and for that purpose it was resembled to the stat. *de circumspete agatis*, that the bishop of *Norwich* and his clergy shall not be prohibited from proceeding in matters spiritual; which statute has been construed to extend universally to all bishops. But on reading the statute it will plainly appear, that the intent of it was, to declare the law in general, as to what things the Spiritual Court ought to hold plea of; and therefore, tho' it mentioned the bishop of *Norwich* at the beginning, as being, I suppose, the party more particularly aggrieved, and that complained chiefly at that time, yet it declares the law in general words; "If the prelates do punish any persons for leaving the church-yard uninclosed, &c." And at the latter end, there is a general clause, "that in all the cases above rehearsed, the spiritual judge shall have power, notwithstanding the king's prohibition."

The stat. 1 R. 2. c. 12. was likewise cited, which gives an action of debt for an escape against the warden of the Fleet; which has been extended to other gaolers. That is a matter which concerns the universal justice of the kingdom: But in our case, here is a new erected inferior jurisdiction, within a particular district only, in four particular matters, incontinencies, scolds, inmates, and nuisances; and therefore this must be taken strictly, as all inferior jurisdictions are.

Admitting, however, that it did give the constables a jurisdiction in those four matters, it cannot be pretended that it gives them a jurisdiction in any other matter; and therefore I would beg leave to take notice, that this act of parliament could never authorize the constable, in this case, to act here upon his warrant for recruits, which the special verdict finds he did: And therefore he has plainly exceeded his authority in the first instance; for the act for recruits, p. 87. gives a power to constables only within their respective jurisdictions. Neither, as I apprehend, can the matter, which this woman was suspected of, come within any of those four things mentioned in the act; for tho' the word, '*incontinencies*' is in the act, yet the suspicion here is tied up only to her being an idle and disorderly person, and that does not, of necessity, imply incontinency; so that the very matter in dispute is not within the act.

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As to what is found in the verdict, of the usage to act in *Westminster* throughout any parish, *that* can never be intended a custom time out of mind; it only says *usitatum fuit*, but does not say how long; it might be but for a year before. If therefore such a custom had existed time out of mind, there is no doubt but so material a circumstance would have been stated; neither would it have been necessary to have found the act of parliament. It is plain they depended on the act for their authority in this matter.

As to the case that was cited upon this head of *Allen and Bush*, 2 Ro. Abr. 699. pl. 9. that case was no more than this: It was found in a special verdict, that *A.* was deprived by the high commissioners authority *virtute literarum patentium dominæ Eliz. &c.*; and it was there held, that letters patents should be understood to be *sub magno sigillo*. That seems to be a very easy intendment, because I believe the word *patents* is never made use of, but where they are under the great seal; but in this case, *consuetudo* is the proper word for a custom, and it ought to be found, that it was so time out of mind; but *usitatum fuit* was never yet admitted.

2. That *Bray* had no authority to take up this woman, tho' he had been constable of *Covent-garden*. The question as to that will be, Whether a constable has an authority to take up any person, upon bare suspicion that he is an idle disorderly person; without any appearance, or so much as a probable cause, to induce that suspicion?

That the case is no more than this, will plainly appear by what the verdict has expressly found. It is found, that he had no warrant to take her; and that she was doing no harm, nor had any ways behaved herself ill. It is found, that she was walking in the street, between the *Rose* tavern and the play-house; and that it was at a seasonable time of the night, betwixt eight and nine o'clock in *March*. It is indeed found that he had once before taken her up as a disorderly person; but it does not appear there was any prosecution of her, or that she was so much as carried before a magistrate: And it might be, for ought that appears, with as little reason *then*, as it is *now*; and therefore that circumstance rather aggravates the oppression.

It is not so much as found, that she was a person of ill fame and repute; there is nothing but what might be found of the most modest person living; and therefore the question, as I said, will be, Whether the constable, upon his bare suspicion, without shewing any reason for it, can imprison any one; and this is a question of great consequence, because, if the law be so, the liberty of every subject is in the power of a constable.

As

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As to *that* question, I humbly submit, that in case of a bare suspicion, a constable has no greater authority than a private man; and must take care, at his peril, that there is cause for the suspicion. I agree, that where a constable sees an affray, he may commit the party; but where he acts barely upon suspicion, he can justify it in no other way than a common person. For that there is a remarkable case in 5 H. 7. fo. 4. and that I think will prove, both that there must be a cause of suspicion, and likewise that an officer of justice is in the same case, as to that matter, with any other person. The principal case was this: It was an action of trespass and false imprisonment; the defendant justified and said, that one J. S. had been poisoned, and the common voice and fame was, that the plaintiff had poisoned him; and thereupon the defendant, by the command of the sheriff of the county, and as his servant, took the plaintiff and imprisoned him. The chief exceptions to this plea were two; first, that common fame was not sufficient cause of suspicion; but as to that it was held to be sufficient, provided it be alleged that a felony was committed; and it was held that it was traversable, whether a felony was committed or not. Another exception was taken to the plea, because the defendant had justified as *servant* to the sheriff; whereas upon the matter of his plea, being grounded on the cause of suspicion, every man has as much authority to take up the person as the sheriff, or any other officer; and, as the expression of the book is, every man is an officer to that purpose; therefore he should have justified under his own authority, and not on that of the sheriff. And for that cause, the plea was held ill; and thereupon the defendant amended his plea, and justified *in his own right*, upon the cause of suspicion.

The cases are numerous, that there must be a good cause for the suspicion, and that the cause is traversable. I shall barely name them. 14 H. 8. 16. 7 E. 4. fo. 20. 27 H. 8. fo. 23. *Ero. Faux Imp.* 1. 4 H. 7. fo. 2. *Bro. Imp. pl.* 4. 3 *Bulstr.* 285. 1 *Bulstr.* 150. 3 *Inst.* 118. 221. *Sty.* 166.

2 *Inst.* 52. is very express. "When a treason or felony is committed, and the common fame and voice is, that A. is guilty, it is lawful for any man that suspects, to apprehend him." Again, "If any one has just cause to suspect, this is a good warrant in law for him to arrest any man: But he must shew *in certainty* the cause of his suspicion; and whether the suspicion be just and lawful, must be determined by the judges."

To the same purpose is 12 Co. 52. (Sir Anthony Ashley's case) wherein it was resolved, that a man may be arrested by any one upon suspicion of felony: But in this case, my lord Coke says, three things are to be observed; 1. That a felony be done.

2. That he who arrests have a suspicion upon probable cause, which must be pleaded, and is traversable. 3. That he who has the suspicion, do himself arrest the party; for he cannot command another to do it. And a great many authorities are there collected and set down, to prove each of these assertions.

There is a case in 2 *Vent. fo. 22. Rudyard's case*, that even a justice of the peace must set forth the cause of his suspicion, before he can require sureties for the good behaviour. In that case, upon a *habeas corpus*, the justice returned that there was just cause to suspect *Rudyard* to be guilty of divers misdemeanors, and that therefore he required of him sureties for his good behaviour, which he refused, and therefore he committed him; and this was held an ill return, because he ought to have set down the cause of his suspicion.

Obj. That a constable or watchman may arrest night-walkers, and he might take her as such: But then it ought to appear that this woman was one, that she was wandering about suspiciously at an unseasonable time of the night; and so are the precedents that justify upon that account. There is one in *Herne's Pleader* 488, 489. in which the defendant sets forth, that the plaintiff was wandering in the streets at twelve o'clock at night, and the defendant, being on his watch, demanded of the plaintiff whither he was going, which he refused to answer; and thereupon he took the plaintiff. But that is not like this case; for in this case, nothing material is found concerning this woman, but what may be said of any one that walks about her lawful occasions. It is found to be between eight and nine o'clock at night in the month of *March*, and that she was then doing no harm, nor had done any.

As to the authority cited out of *Lambard Just. fo. 12.* in a treatise of constables, (at the end of the book) where it is said, that a constable may arrest such strange persons as walk abroad in the night season; that book refers to the statute of *Winchester*, and that statute is very material, to prove that the time mentioned in the special verdict was a seasonable time of night; for it says, that no person shall lodge out of the town, or in the suburbs, from nine o'clock at night till the morning, unless his host will answer for him; whereby it appears, that nine o'clock was at that time taken to be a seasonable time; and if it were a seasonable time *then*, there is much more reason that it should be accounted so *now*, since it is well known there are as many people walking in the streets at that time as at noon, all of whom would be liable to be taken up by the constable, if it should be sufficient for him to say, they were walking the streets between eight and nine o'clock at night.

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As to the stat. of 5 E. 3. c. 14. that was cited, it refers expressly to the stat. of *Winchester*, for arresting persons that pass by the country in the night: And as to what is said afterwards, that a constable may arrest, *by day or by night*, persons of whom any have an evil suspicion, that plainly refers only to felonies; and so it has been always taken. And the very words, if they are considered, are so; for it recites, that divers manslaughters, robberies and felonies, have been committed, by people that were called *roberdsmen*, *waftors* and *draw-latches*; and enacts, that if any man have any evil suspicion of such, *be it by day or by night*, he shall be arrested by the constable: So that it plainly refers only to felonies. And though the statute says, if *any* have evil suspicion; yet it must be intended only of such, as can give a reason for their suspicion.

As to the case of 13 H. 7. fo. 10. b. that was cited upon the last argument, where it is laid down as a general rule, that a constable may take up any one that is suspected; I answer, that the principal case there was, that the plaintiff, who had brought his action against the constable, was taken in a bawdy-house, with women of ill fame, at 12 o'clock at night; and thereupon the constable took him, till he found sureties for his good behaviour: And that was held to be a good justification; being indeed no more than was resolved in a late case in B. R. *Mich. 13 W. 3.* (the *King* against *Simonds*) in which, upon a *ba. cor.* it was returned, that the defendant was found in a disorderly house suspiciously, and taken into custody till she found sureties for her good behaviour; and thereupon she was remanded. As to the resolution of the Judges in that case of 13 H. 7. it says, that it is lawful for a constable to take suspected persons, that walk in the night and sleep in the day, or that keep suspicious company. This resolution, when it mentions *suspected* persons, must certainly intend such as are justly suspected.

These were the chief authorities, which were cited, to prove the authority of the constable in this matter: But I hope that none of them come up to this case; and that he had no lawful authority at all to imprison this woman. The consequence of that will be that he was a trespasser: An action of trespass and false imprisonment lay against him; he was by law indictable for it, inasmuch as he was the first breaker of the peace.

Where there is a want of jurisdiction in the officer, the law never justifies him; tho' he acted through ignorance, or out of a good design. And there is no *medium* in this respect; for if he trans-

It has been since held, after judgment in an inferior court, neither the officer nor the party are bound to take notice, whether the cause of action arose out of their jurisdiction. If it did so, the defendant should have pleaded it in the inferior court; and shall not afterwards take advantage of the want of jurisdiction in any collateral action against the plaintiff, or the officer, who executes the process. *Ld. Raym. 230, 1.*

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gress his jurisdiction never so little, the law of *England* has so secured the liberty and property of every subject, that it will make the whole proceedings void, and the officer a trespasser *ab initio*. To this purpose is *Cro.* 394.

Nichols and Walker's case. An action of trespass was brought against a church-warden and overseer of the poor of the parish of *Hatfield*. And tho' the defendant had a warrant from a justice of the peace, to levy rates assessed for the poor; and tho' the plaintiff lived within the parish; yet as he lived in *Totteridge*, where they had a chapple of their own, and maintained their own poor, there was a defect of jurisdiction: And it was held the action lay. And in 2 *Ro. Abr.* 566. *pl.* 1, where the same case is mentioned, it is said that officers must of necessity take notice of the law at their peril.

To the same purpose was the case of *Terry and Huntington, Hardw.* 480. where the commissioners of excise adjudged low wines to be strong waters; and it was held the action lay against them; because they have only a jurisdiction over strong waters, and therefore if they adjudge any thing (tho' it be never so like) to be strong waters, that is not so in fact, they exceed their jurisdiction, and an action lies.

It is common in experience, that if, in a writ to arrest a man, the name be mistaken, the officer is liable to an action of false imprisonment, tho' the person arrested was perhaps the same who was intended to be taken. Nay such a mistake in the writ will make the killing of an officer to be but manslaughter; whereas otherwise it would have been murder; and that was the case of *Sir Hen. Ferrers. 1 Cro.* 371. *1 Jo.* 346. A writ issued against *Sir Hen. Ferrers Knight*, whereas he was no Knight but a Baronet; and it was held that killing the bailiff, executing that warrant, was not murder; because the warrant was ill.

Supposing that *Bray* had lawfully imprisoned the woman, the next question is, how far *that* affects this case, so as to make the killing of *Dent* to be but manslaughter.

As for that, he must be considered in the same manner as if *Bray* himself had been killed; For it is expressly found that he came to assist *Bray* in detaining the woman: And so if *Bray* was a trespasser in that, he will likewise be a principal in that trespass; and if *he* be killed, it will be all one as if *Bray* had been killed.

Sty. 467. (*Buckner's case.*) That was an indictment on the statute of stabbing; and it was found, on a special verdict, that one *Horwood* and another man came to the lodging of the defendant *Buckner*; and the other man takes a sword, and stands with it undrawn, to keep the door of the chamber, and to prevent the defendant *Buckner* from going out, till a bailiff might come up to arrest him: Thereupon *Buckner* takes a dagger out of his pocket,

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pocket, and stabs *Horwood*, and kills him. It was held, that this was a case not within the statute of stabbing; because there was a trespass and an imprisonment of the defendant, and therefore out of the meaning of the act. But that which I chiefly cite it for is, that killing the person, who did *not* hold the door, was considered all one as if the person that held the door had been killed; because they were both principal trespassers. And Ch. J. *Glynn* upon that puts this case, (*page 469.*) If two assault a third person, and one of them strike him, and he kills the other person, who did *not* strike him, he is not within the statute; because in judgment of law it was the striking of both.

It is found by the verdict, that the constable called for assistance, to help him to detain the woman; whereupon *John Dent* came, *ad eundem Samuel Bray assistend*; and that *Dent* was killed *dum assistabat*. This we hope will be very strong to prove that *Dent* was in the same case with *Bray*.

And then the question will be, how far a stranger, interposing and endeavouring to rescue the woman, will be guilty; For to justify we cannot: But the question will be, whether this unlawful imprisonment of the woman, and the desire that the defendant had to rescue her, be not such an alleviation of his guilt, as to mitigate the crime, and make it but manslaughter.

As to that, I must beg leave to state the circumstances of the special verdict, as they are found, in order of time: 1st. Here is no malice found, either to *Bray* or *Dent*; but it is expressly found that the first attack was to rescue this woman, *Gladia sua extraxerunt, ea intentione ad eandem Annam extra custodiam ejusdem Samuelis rescuend et deliberand*. In the next place it is found, that *Bray* shewed them his constable's staff, and said he was about the Queen's business. He did not charge them to keep the peace, but only said that he was about the Queen's business. By that it should seem that he meant the business of the recruits; but that appeared plainly to be false, because it was a woman he had taken up. However, upon that they put up their swords, and seemed satisfied.

The next fact that is found is, that they carried the woman, and put her into the round-house. Upon this the defendants renew their design of rescuing the woman, *gladia sua iterum extraxerunt, occasione imprisonamenti, & eandem Annam exonerari causand*.

This was one continued act in the constable, and carrying on the trespass from one degree to another; and therefore though the woman was not known to the defendant, yet this being a breach of the law, even of *Magna Charta* itself, may in some measure be thought the case of every subject: And since they ought *all* to enjoy the privilege of it equally, it is natural for *every one* to desire to see it preserved; and if that desire has transported them beyond

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what the law will justify, yet we hope it will so far extenuate the crime, as to make it only manslaughter, and not done out of mere malice.

It was admitted, upon the last argument, that if the woman had done this, it would have been but manslaughter; but I must submit it, whether it would have been so much, but only *se defendendo*.

4 *Inst.* 334. (*Simpson's case*.) A constable came, by warrant from the high commissioner, to arrest one, who killed the constable, in defending himself from imprisonment; and it was held to be *se defendendo*, because the warrant was illegal, being for usury, &c.

I agree, that in this case the trespass was not done to the defendants themselves, but to a stranger: And therefore I would beg leave to consider, how far it will be murder or manslaughter, when one interposes in the quarrel or concern of another.

12 *Co.* 87. Several men were playing at bowls, and two of them fell out and quarrelled; a third person, who was not in the quarrel, in revenge of his friend, struck the other with a bowl, of which he died: This was held to be but manslaughter, and yet there was no injury done to the person himself that did the fact.

Plow. 100. 101. *Salisbury's case*. He and three others were indicted for the murder of the servant of Dr. *Ellis*. The third had malice prepense; but *Salisbury* had no malice prepense, only seeing the rest engag'd he took part with them; and that was held but manslaughter, tho' *Salisbury* himself was the man that actually did the fact.

To the same purpose is *Ha. Pl. Cor.* 51, 52. Where my *Ld. Hale* puts the case generally, without distinguishing whether the party that strikes be known to them or not. His words are these, "If *A.* and *B.* are fighting, and *C.* comes in suddenly and takes part with *A.* and kills *B.* that is but manslaughter;" and for that he cites *Sir Fred. Cary's case*.

So far the *old cases* went; but there is a *later case*, which I think suits with ours in every material circumstance. It is the case of the *King* against *Huggett*, determined on a special verdict, found in 18 *Car.* 2. And because it comes so near the case in question, I beg leave to state it fully, with all its circumstances. At a gaol delivery at *Newgate*, 25 *April*, 1666, 18 *Car.* 2. upon an indictment for murder against *Hopkin Huggett*, a special verdict was found to this effect: That *John Berry* and two others with him, the day and place of inquisition, had *de facto*, but without warrant (for ought that appears) impressed a man, whose name is not yet known, to serve in her Majesty's service, in the war against the *Dutch* nation: That thereupon, after the unknown man was impressed, he, with the

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said *John Berry*, went together quietly into *Clotb-fair*; and the said *Hopkin Huggett* and three others, walking together in the rounds in *Smithfield*, and seeing the said *Berry* and two others, going with the impressed men into *Clotb-fair*, instantly pursued and overtook them, and required to see their warrant; upon which *Berry* shewed them a paper, which *Hopkin Huggett* and the three others said was no warrant, and immediately drew their swords, to rescue the impressed man, and did thrust at the said *John Berry*: And thereupon the said *John Berry* and the two others did draw their swords, and fight together; and thereupon the said *Hopkin Huggett* did give the wound, in the inquisition, to the said *Berry*, whereof he instantly died. And if upon the whole matter the said *Hopkin Huggett* be guilty of *murder*, they find him so: If of *manslaughter*, they find him so, &c. All the Judges of England, being met together at *Serjeant's Inn*, *Fleet street*, upon other occasions, and having copies of this special verdict previously sent them, after the other business was dispatched, were desired to give their opinion on this case; whether they held it to be murder or manslaughter: And the *Ld. Ch. J. Bridgeman*, *Ld. Ch. Baron Hale*, and the Justices *Atkins*, *Tyrell*, *Turner*, *Browne*, *Archer*, and *Raynsford*, having had the notes of the special verdict three days before, delivered their opinion as being advised, (but said they would not be bound by it) That this was no murder, but only manslaughter. And they said that if a man be unduly arrested, or restrained of his liberty, by three men; although he be quiet himself, and don't endeavour any rescue, yet this is a provocation to all other men of England, not only friends but strangers, for common humanity's sake, (as my *Ld. Bridgeman* said) to endeavour his rescue: And if in such endeavour they kill one, this is no murder but manslaughter. The four Judges of the *King's Bench*, (*viz.*) *Ch. J. Keeling*, Justice *Twisden*, *Windham* and *Morton*, were of opinion it was murder; and tho' they were the persons before whom the matter judicially depended, yet they had so great a regard to the opinion of the eight Judges, that they gave their judgment only for manslaughter, and the defendant was burnt in the hand; as appears by the record, a copy whereof I have seen, and which is entered in the crown-office, of *Mich. 18 Car. 2. rot. 7.*

This is a compleat authority, for the judgment was given accordingly; and it agrees in every material circumstance with our case. *There* it was an unlawful imprisonment; and so, with submission, it is in *this* case: *There* the person imprisoned was not known to those who rescued him, any more than in *this* case. It is true, there was an actual fighting in that case, but *that* will not alter the matter; For if one out of malice, either express or implied, assault another, and they fight together, and the first aggressor receive several blows, nay tho' he be driven to the wall, yet, since he made the first assault out of malice, if he
kill

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kill the other it is murder; and that was so resolved in *Mawgridge's* case, which is so fresh in your memories that I need not repeat it; and so it is held in *Kel.* 58; and that was likewise agreed by all the Judges in *Huggett's* case: So that there is not a material difference between the two cases.

There is one circumstance in our case that seems stronger than this: It was much insisted on by the four Judges in *Huggett's* case, that the person impressed submitted quietly, and was willing to go along with them; but this is not found in our case, neither is it to be supposed that any one will quietly and willingly submit to go to a common prison. It is true that in *Huggett's* case they demanded a sight of the warrant, and one of them undertook to say that it was no good warrant; but he said that at his peril, and if there had been a good warrant, his thinking that it was no good warrant would not have excused. And therefore it was resolved, in *Sir Charles Stanley's* case, *Kel.* 86. that if a man be arrested, and he and his company endeavour a rescue; and while they are fighting, one who knows nothing of the arrest, coming by the way, goes in aid of the person arrested, and kills one of the bailiffs, that is murder, though he did not know him: And so is *4 Co. fo. 40. Young's Case*. So the defendants in this case did act at their peril; and their not asking for the warrant was not material.

In that case of *Sir Henry Ferrers*, He did not know that there was a mistake in the writ; and yet since *in fact* there was, it was considered to be but manslaughter.

The distinction that the four Judges go upon in *Huggett's* case seems very extraordinary; for they put the difference, where there is an actual striving or fighting. Here however the imprisonment is an act of violence, in the consideration of the law; and that tho' the party submit never so much: For suppose half a dozen surround one, and take him away and imprison him, in that he is forced to submit, because he is overpowered.

It was much insisted on, the last argument, that if one commit a trespass upon another's ground, and the owner of the ground kill him, it is murder; but the true reason of that is laid down in *Mawgridge's* case, which is now in print, (*fo. 132.*); because it is a violent act beyond the proportion of the provocation. And so it was in *Holloway's* case, *Cro.* 131. 1 *Jo.* 198. *Palm.* 585. where a boy had been stealing wood, and the owner pull'd him down, and tied him to the horse's tail; and whipt the horse, which dragged him till he died: That was a barbarous act, and not proportionable to the provocation. But here in our case the assault was not with an intent of revenge, upon the parties that imprisoned the woman, but with an intent to rescue her; and in rescuing the woman, this fact was done: Therefore it differs mightily from that case.

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Upon the whole matter, I humbly hope that *Bray*, upon whom the first assault was, had no protection from the law as constable; either in respect of the *place* where he was, or the *matter* he was about: If so, the law will not imply malice; and if there be no malice implied, we hope you'll intend none upon the special verdict, since the intent found was only to rescue the woman.

Upon this and several other arguments, seven of the Judges, viz. *Holt Cap' Just' de B. R. P. 249. P. 249. Bar' de Scacc', Holt Cap' Just' de B. R. P. 249. P. 249. Bar' de Scacc',* were of opinion, that the prisoners were guilty of *manslaughter*; and *Trevor Cap' Just', Tracy, Blenco and Dormer Just' de C. B. and Ward Cap' Bar' de Scacc',* were * of opinion, that it was *murder*; and the last day of the term, the prisoners being brought to the bar *de B. R. Holt Cap' Just'* delivered the opinion of the twelve Judges, as follows:

He said, he would first shew the reasons the seven, who thought it manslaughter, grounded their opinion upon; and those were, 1st, That it was a sudden action, without any precedent malice, or apparent design of doing hurt; but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and if the woman was unlawfully imprisoned, then it cannot be murder; and cited 4 Co. 40. *Young's* case, and 9 Co. *Mackelly's* case, where it is held, that if a constable be kill'd in the execution of his office, 'tis murder; but 'tis otherwise, when he is doing a wrongful and oppressive act.

'Tis not only necessary to make it murder, that the constable is in the execution of his office, but he must give notice that he is come to keep the peace; and cited *Thompson's* case, *Keil*. 66, and so are *Young's* and *Mackelly's* case to be understood; for if he does not give notice, the party may reasonably suppose that he came to assist his adversary.

The second thing to be considered is, whether *Bray* was in the execution of his office. The Stat. 27 *Eliz.* does not name a constable; but only a power is thereby given to the dean, high steward and capital burgeses of *Westminster*; but sure it does not follow, that the constable has such a power; and we are all agreed, that the power of the constable is no greater than it was before this act. One of my brethren held, that *Bray* was constable *de facto*; but that cannot be, since there was a constable at that time of *Covent-Garden*. Now if the constable of one parish has not power over the whole liberty, then *Bray* had no more authority than if he had been no constable at all.

Suppose, for argument sake, that *Bray* was constable of *Covent-Garden*; I am of opinion, that the taking up the woman was illegal, tho' she had been in his custody before; and if so, he did not act as a constable, but as a * common oppressor. When he had her in his custody before, the verdict does not find that she was guilty of any disorderly act; 'tis not a constable's suspecting, that

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that will justify his taking up a person, but there must be just grounds of suspicion; as in case of a felony committed, and that is traversable. 2 *Inst.* 52. It would be hard, that the liberty of the subject should depend upon the will of the constable; and shall his not liking the woman's looks be just cause of suspicion?

3. The prisoners had sufficient provocation; for if one is imprisoned upon unlawful authority, it is a sufficient provocation, out of compassion, much more when 'tis done under colour of justice; and cited *Roystan's case*, 2 *Cro.* and 12 *Co.* 87. And where the liberty of the subject is invaded, 'tis a provocation to all the subjects of *England*. He said, a constable cannot arrest; but where he sees an actual breach of the peace; but if the affray be over, and things quiet, he cannot arrest. 3 *Cro.* 372. 30 *H.* 7. fol. 10. Constables have authority by the statute to arrest persons, but that must be by warrant from a justice of the peace; but in this case there was no warrant.

The reasons of the five Judges, that it was murder, were these, four of them did agree, that the constable had no authority; but one was of opinion; that shewing his staff was sufficient; but I never knew, that the constable's staff was of such efficacy, when the constable himself had no authority.

Four of them held, that, she being a stranger to them, 'twas no provocation; otherwise if she had been a friend or servant. But surely a man ought to be concerned for *Magna Charta*, and the laws; and if any, against the law, imprison a man, he is an offender against *Magna Charta*.

We seven hold this to be a sufficient provocation, and we have good authority for it in *Hopk. Huggitt's case*; and this case is stronger than that. The Judges that were of opinion that that case was murder, went upon this reason, viz. that he was a stranger to the person impressed; but tho' of a different opinion, yet gave judgment according to the opinion of the eight. It was not the fighting * that made it manslaughter, but the provocation by * P. 251. the unlawful imprisonment; for if one, without provocation, draw his sword upon another, and the second draw, and they fight, and after mutual passes the second is kill'd, 'tis murder.

The five that think this case murder, say, that to a relation or a friend, 'tis a provocation, but not to a stranger; but that is a distinction not to be met with in the books. He cited *Plowd.* 101. Where two fight upon malice prepense, the servant of one of them, not knowing of the malice, comes to assist his master, and kills the other, this is held but manslaughter in the servant; which case is abridged *Hale's Pl. Cor.* 51. The reason of the case above, is not that he was servant, but because he knew not of the malice.

They say that *Hopk. Huggitt's case* is *primæ impressionis*; but yet 'tis of good authority, being given upon mature deliberation, and resolved by eight of the Judges.

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Then say they, that in the case at bar, it could not be a provocation to the prisoners, because they knew not that she was illegally arrested; but surely *ignorantia facti* will excuse, but never condemn a man: A man in this case acts at his peril, but he must not lose life for his ignorance of the fact, when he happens to be in the right; and cited Sir H. Ferrar's case, *Cro. Car.* 271. where he was arrested by a warrant that named him Knight, whereas he was a Baronet; his servant kills the bailiff, this adjudged manslaughter only, because he was arrested upon an ill warrant. He put a case, that suppose a man has a judgment against him, and goes abroad, he is informed, upon his return, that there are bailiffs in his house, he goes in and kills one of them, but it proves that they are thieves that came to rob him; in this case he is in no fault. It was likewise objected by the five, that it is dangerous to allow such a power to the mob; but I think that no proper word to be used in a court of justice; and a provocation does not make it an allowing the offence, but only a mitigation of the punishment; and for this the law makes the distinction between murder and manslaughter. They say, that

* P. 252. the prisoners came after the imprisonment was * over; but certainly their putting her in prison, and not carrying her before a justice, as they should have done, is an aggravation; and why should *Bray* call *Dent* to his assistance after she was in prison. All agreed, that he was not constable of *Covent-Garden*, therefore it could not be murder: For if a writ be directed to the sheriff of *Middlesex*, and the man steps into *Bucks*, the sheriff follows and arrests him in *Bucks*, he kills the sheriff, this is only manslaughter.

I am as much for a reformation as any one, but in a legal manner; for *vir bonus est quis? qui consulta patrum qui leges juraque servat*; and concluded it only manslaughter. But note; The court would not call the prisoners to judgment, nor let them pray the benefit of the clergy act; nor suffer them to wave the Queen's pardon; because the court was bound to take notice of the late act of grace, as a general law, whereby the manslaughter is pardoned. But they ordered a special entry to be made upon the roll, that the court would not give any judgment, because of the general act of pardon; therefore they were discharged as to the indictment. Upon which the sheriff produced a writ of appeal, which was delivered to him; and the court held, that the prisoners were in custody as to the appeal, by the delivery of the writ to the sheriff.

Mason

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Mason *versus* Vowson.

- (2.) **A** Judgment was had against the defendant *Vowson*, and after judgment obtained, he voluntarily listed himself a soldier; and after the said listing, he was taken in execution by virtue of a *cap' ad satisf'* upon that judgment; and a motion was this term, that he might be discharged according to the late act of parliament, which says, *That any person, that voluntarily lists himself a soldier, shall not be taken out of her Majesty's service by any process whatsoever.* But *per cur'*, the motion was denied; for the words, *any process*, must be intended only of a mean process, and not be extended to executions; for that would * be hard upon creditors, and put them *sans* remedy. Wherefore *Vowson* was not discharged.

A. in execution not to be discharged by the act for enlisting soldiers. *Vide ante*, p. 191, 234. 2 Vern. 697. 2 Ld. Raym. 1246. 1 Str. 7. Barnes 4to ed. 432. * P. 253.

Mrs. Pool's Case.

- (3.) **A** *Habeas corpus* was directed to the keeper of the *Counter*, to bring up the body of ——— *Pool*, to which they return the custom; that a feme covert sole trading shall be sued as feme sole, and that the husband is neither chargeable in body or estate.

Custom of London to sue a feme covert trading as a feme sole. 1 Show. 183. and see a good case, as to this custom, in 3 Burr. 1776, &c.

Mr. *Salkeld* objected, that the custom was bad, because unreasonable; for the husband might take her goods, &c. and if she were liable for debts, and not have her own goods to satisfy them, then she may be detained in custody, without possibility of ever being released.

But *per cur'*, The husband has nothing to do with the goods or money with which she trades, and those are liable to debts. As she may be sued sole, so may she sue sole for debts owing to her within the city; but for those due to her elsewhere the husband must join.

If a woman be found guilty of a battery, and fined, the husband shall not be liable.

- (4.) *Holt*, &c. made it a rule of court, and ordered it to be screen'd up in the office. That no bail-bond shall be assigned in town till four days after the return of the writ; and not 'till six days after the return in a country cause.

Bail-bonds not assignable till four days after the return of the writ in town; 8 Ann. B. R.

fix in country causes. Reg. Mich.

Anonymous.

- (5.) **M**R. *Pengelly* moved, that certain persons, bound in a recognizance to appear in B. R. for a riot, might appear by attorney and not in person, being poor people. But

Appearance on a recognizance B. R. must be in person, and not by attorney. Ante 200.

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his motion was denied; for 'tis the constant practice to appear in person.

* P. 254.

* Fitzgerrard *versus* Trant.

A covenant not to sue one of the obligors, no discharge as to the rest.

1 Ld. Raym.

419.

2 Salk. 574.

5.

12 Mod. 221.

415, 548.

Holt 178.

218. 3 Salk.

(6.) **D**EBT upon a bond by the executor of the obligee: Upon oyer of the bond, it appeared *A. B.* and *C.* were bound jointly and severally to the obligee; the defendant pleaded a release made by the obligee to *B.* one of the obligors; and upon oyer of the release, it appeared that the obligee covenanted with *B.* not to sue him upon this obligation; the plaintiff demurs; and adjudged, that a covenant not to sue one of the obligors, where there are several, is no discharge against the others. *Q.* Judgment for the plaintiff; *Absente* Holt.

298. but see Lit. Rep. 190.

Smith *versus* Bowen.

Burning in the hand in an appeal pardoned.

Ante 216.

230.

2 Ld. Raym.

1288.

Holt 355.

S. C.

Stra. 1203.

(7.) **T**HE appeal being tried at bar this term, the appellee was found guilty of manslaughter only: Whereupon he prayed the benefit of his clergy; and the court being of opinion, that the statute that gives the clergy extends to appeals, and that the burning in the hand, being no part of their judgment, the Queen could pardon it; according to *Biggins's* case, 5 Co. 50. Thereupon the appellee was immediately discharged without bail, being pardoned by the late act of grace.

Dr. Butler *versus* Cobbet.

Mandamus to commissioners of the land-tax, to tax estates equally.

Ante 206.

Carth. 450.

(8.) **M**ANDAMUS directed to the vice-chancellor of Cambridge, and other commissioners of the land-tax, to make an equal assessment upon the inhabitants of *St. Andrew's Barnwell*.

Sir Tho. Parker moved to quash the writ; for that it should have been, to make an equal assessment upon the occupiers of the land; for every occupier may not be an inhabitant.

* P. 255.

Str. 393.

* *Holt* Ch. J. said, the writ was bad; but if it was good, a *mandamus* was not a proper remedy for an unequal taxation; but the proper remedy is by appeal to the commissioners: but perhaps if the assessors refuse to tax any part, as the case of *Sturbridge Fair* is, a *mandamus* lies.

Powell said, It was usual to grant *mandamus's* to overseers, when they will make no taxation; but not upon suggestion, that they intend to make an unequal tax.

Another

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Another exception was taken to the writ, that it set forth the year in figures; but being in *roman* figures, it might be good for all that; otherwise if in *english* figures. The writ was quashed *nisi*.

Stebbing *versus* Warner.

(9.) CASE; declaration that the defendant, endeavouring to charge the plaintiff to have him indicted for felony, said of the plaintiff these words, *damn him he is a pick-pocket*; & postea in præsentiâ quamplur' apud, &c. *look here, he has pick'd my pocket, and taken out all my silver and gold, and damn him he is a pick-pocket*; & postea apud N. in alio quodam colloquio, &c. *The rogue has pull'd out my pocket, and stole all my silver and gold from me*; & postea, &c. *he has pick'd my pocket of all my money, and damn the rogue, he is a pick-pocket*.

Words.
Damn him
he is a pick-
pocket.
2 Lev. 51.
1 Rol. abr. 68.

Sir Edward Northey for the plaintiff argued, that tho' it is not said, that he feloniously pick'd the defendant's pocket, yet it must be taken in the same sense that it was spoken; which was, that he pick'd his money out of his pocket, which is felony: Besides it is laid, that the defendant spoke them with intent to charge the plaintiff with felony, and the jury have found it to be with that intent; for they found the defendant guilty of the fact charged in the Narr'.

The authorities he cited were *Cro. Car.* 327. 329. *Penson versus Gooday.* 2 *Brownlow* 280. *Stile* 150. *Bulstrode* 134. 1 *Roll's Abr.* 68. *Cro. Car.* 136. *Yelv.* 136.

* *Raymond ad idem*: Pick-pocket is actionable; and cited Sir * P. 2564 *T. Jones* 235. 2 *Lev.* 136. The case of *Speed and Perry, Trin. 4 Annae Reginae*, where clipper and coiner is adjudged actionable; and 2 *Vent.* 172.

Mr. Thomson, upon whose motion the defendant was to shew cause why judgment should not be arrested, said, that pick-pocket alone was not actionable; and the words were spoken at different times, and upon different colloquia; and the intention to charge the plaintiff with felony, is laid only to the first words, viz. *damn him he is a pick-pocket*; and if words that are not actionable, are joined with words actionable, but spoke at different times, and under different colloquia, and intire damages given, judgment ought to be arrested; and the words being spoke at different times, one part shall not be taken to explain the other; and cited 2 *Lev.* 51.

Holt, &c. said, It would be hard to explain words spoken at one time by what is said after.

Holt: To say a man is a pick-pocket, and has pick'd my pocket, in common acceptation is actionable: But they have overdone it; and if there are any words found, that are not actiona-

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able, judgment must be arrested (a); and another day this term, judgment was arrested.

Jones *versus* Willson.

Two counts, one on a promise to the intestate, the other to himself as administrator; after nonsuit shall pay costs for the whole. Say. Law of Costs, 94, &c.

(10.) **A**CTION brought by an administrator, and declares upon two counts; one upon a promise to the intestate in his life-time, the other upon a promise to the plaintiff himself, and names himself administrator in both; and upon the trial the plaintiff was nonsuit; and the question was, Whether he should pay costs?

Powell Just. *Holt absente*, said, That these two counts could not be joined; and if an entire judgment had been given, judgment should have been arrested. But it is a question, Whether it might not have been made good, by taking judgment upon one count only. But in this case the * plaintiff must pay costs, because the nonsuit goes to the whole; and so it was ruled by *Powell, Powis, and Gould*.

* P. 257.

Anonymous.

Errors on a judgment in *Ireland* assigned here by attorney. Str. 417, 443.

(11.) **M**R. *Snell* moved, that the plaintiff in a writ of error of a judgment in *Ireland*, might assign his errors by attorney, upon affidavit, that he was resident in *Ireland*; and offered to find sufficient bail. Granted.

Mr. *Harcourt* cler' coron' said, it had been done so in the case of *York v. Medley*.

Leveridge *versus* Hoskins and Another.

Case, for digging ditches and diverting his river. *Holt* 24. S. C. *Ld. Raym.* 1403. S. C. cited.

(12.) **I**N case the plaintiff declares, that he was possessed of a farm and a river, *apud D. in com' Devon*; and that the defendants, to damage the plaintiff's farm and river, did, at a place *vocat' Davys's close in com' Dorset*, dig two ditches, and diverted the plaintiff's water out of the river, and damaged the meadows; but does not say *per quod*.

The declaration was as follows:

Devon ff. Johannes Leveridge queritur de Johanne Hoskins et Henrico Goslyne, in custodiâ mareschalli Mareschalliæ dominæ reginæ, coram ipsâ reginâ, existente: pro eo videlicet, quod cum

(a) This practice of arresting the judgment, where some of the words found are not actionable, has been since over-ruled; and it is now held, that the plaintiff, in such case, may have a *venire facias de novo*, and a new trial; and may thereupon sever his damages, taking them for such only of the words proved as are actionable. 1 *Barnes* 337.

idem

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idem Johannes Leveridge, primo die Februarii anno Domini 1707, et diu antea, et semper postea abinde, possessionatus fuisset, et adhuc possessionatus sit, de quâdam firmâ vocatâ Waters Farm, in parochiâ de Membury in comitatu prædicto, cum pertinentibus, nec non de quodam rivulo vocato the river Yarr, alias Yarty river, ibidem currente, prope quâdam clausa vocata the Hams et Moremead, parcella firmæ prædictæ; prædicti Johannes Hoskins et Henricus Goslyne, postea scilicet, eodem primo die Februarii anno supradicto, apud Stockland in comitatu Dorset, in quodam prato ibidem vocato Davies Meadow, duo fossata prope prædictum rivulum fecerunt, ac aquam a prædicto rivulo in prædicta fossata diverterunt, per quod idem Johannes Leveridge proficuum aquæ prædictæ, pro rigatione prædictarum clausarum ipsius Johannis Leveridge vocat' the Hams et Moremead, et aquatione pecorum ipsius Johannis Leveridge, et aliis usibus ipsius Johannis Leveridge, diversis diebus et vicibus inter prædictum primum diem Februarii et diem exhibitionis hujus billæ, perdidit et amisit: unde idem Johannes Leveridge dicit quod ipse deterioratus est, et damnum habet ad valentiam 50l. et inde producit secutam. (a)

It was objected by Mr. *Pengelly*, who moved in arrest of judgment, that this declaration was ill; not shewing that the diversion of the water was consequential of the digging the ditches, which is the gist of the action; so that this is no more than trespass.

But the court were of opinion, that after verdict it shall be intended that it was proved to be consequential.

Then another exception was taken, that the action is brought in a wrong county; for it should be brought where the trenches were dug.

But *per Holt, &c.* 'Tis good; for here is cause of action that arises in both counties, and the action may be brought in either; and if there is a conspiracy in one county, and an indictment in another, the action may be brought in either. But if a nuisance be erected in one * county, to the damage of a man in another, the assise must be brought *in consinio comitatum*.

Cause of action arising in two counties may be brought in either.
7 Co. 2. b.
Dy. 38. b.
3 Leon. 141.
* P. 258.
Continuando.

Then Mr. *Pengelly* took another exception, that the offence was not laid with a *continuando*; but it was, that the ditches were dug such a day, and his close damaged, &c. *diversis diebus & vicibus*, between such a time and such a time; and cited *Hambleton v. Vere*, 1 Lev. 299. 2 Saund. 196. which *Holt* said was not like this case.

(a) This declaration is now first published from Mr. *Lutwyche's* MS.

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Joddrell *versus* Heathcot.

Declaration
in debt for
rent, on a
demise by
mentionat'
existit, ill.
2 Keb. 750,
769, 789,
825.

(13.) **I**N debt for rent, the defendant declares, *quod cum per quandam indenturam factam, &c. mentionatum existit*, that the plaintiff did demise, &c. to the defendant, &c. The defendant pleads an ill plea, to which the plaintiff demurs, and afterwards pleads over.

The counsel for the defendant took exception to the declaration, that *mentionat' existit* is ill in this case. *Raymond*, to maintain the declaration, cited 2 *Lev.* 74, where *testatum existit* is held well in debt; also he said, that tho' it was ill upon a special demurrer, yet it is helped by their pleading over. *Pengelly* for the defendant said, that the case in 2 *Lev.* is debt upon a charter-party, which is the same as covenant, which is agreed on all hands to be well; and in 3 *Keb.* 94. the difference is taken, and there held, that laying a demise by way of *testatum existit*, is ill; he cited likewise *Lutw.* 534, 535. 2 *Saund.* 319. And as to the second exception, that it was helped by the plea; he said, that the plea could not admit more than was well alledged; and that declaring in trespass with a *quod cum* is ill; he cited 2 *Lev.* 206, 193. 2 *Jones* 218, 197.

Powell held the declaration ill; for the demise must be alledged so certainly, as that it may be traversed. He said, it had been held well in covenant, because the precedents are so; and as to the case in *Lev.* of debt upon a charter-party, that is the same as covenant; and declaring in trespass by a *quod cum*, has always been held ill.

* P. 259.
Discontinu-
ance.

* The counsel for the plaintiff, seeing the opinion of the court against them, prayed leave to discontinue; which was granted upon payment of costs.

Queen *versus* The Parish of St. Giles.

Poors rate.
Appeal to the
sessions in
what time.
See the 17
G. 2. c. 38.
f. 4. which
regulates the
time of ap-
peal.

(14.) **T**HE inhabitants of the parish of St. Giles appealed to the sessions upon an order made for the levying a poors rate, in which some were unequally taxed; upon which the sessions dismissed the appeal, and shew for cause in the order of dismissal, *that the court being of opinion, that the appeal should have been to the next quarter sessions, after the making the rate, and not after the taking the distress.* Ideo the court does dismiss the appeal. And this order being removed into B. R. by *certiorari*,

Mr.

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Mr. Eyre, Solicitor-general, Sir Tho. Parker and Mr. Whitacre argued for confirming the order of sessions for dismissal of the appeal. That tho' 43 Eliz. does not say, that the order shall be to the next quarter sessions, yet it is necessary so to be, for else it will create confusion, no time being limited by the act: For if not the first, it cannot be brought in any certain time. That this is not an appeal for relief, but to quash the rate, which should be before any payment upon it, or distress for it; for if the rate is not good, an action lies against the overseers for taking the distress.

Sir Edw. Northey and Mr. Raymond cont. That it is not necessary the appeal should be to the next quarter sessions, for there is no time limited by the act; and that being alledged for the reason of the order of dismissal, 'tis bad. Besides, this appeal was at the next quarter sessions after the grievance.

Per cur', viz. Holt Cap' Just', Powell, Fowis and Gould. This appeal need not be to the next quarter sessions; but the error of the justices is, that they did not proceed upon it when it was before them, and give judgment, whether the rate was good or not: Tho' one of the * parties may have a particular appeal, * P. 260. yet this being a rate, which they think not according to the act, Appeal by the inhabitants. they may appeal together. But it being assigned for a reason, that the appeal was not to the next quarter sessions, the court quashed the order of dismissal.

Gately versus Gillingham.

(15.) CASE by original upon a promissory note; judgment by default, and a writ of enquiry *teste* 8 Nov. returnable *octabis Martini*. Whitacre moved in arrest of judgment, for that there was not fifteen days between the *teste* and return of the writ of enquiry; for in all judicial writs, where you proceed by original, there must be fifteen days between the *teste* and return, not only in the writ, but also in the subsequent process: And accordingly the court (*Holt absente*) inclined that it was ill. *Sed adjournatur*.

In actions by original there must be fifteen days between the *teste* and return both of writs and process. Booth 5.

Bull versus Clifton.

(16.) SIR Edw. Northey moved, that the plaintiff in error might put in special bail. This was an action upon the case on a bottomree bond, to pay money on a contingency, the condition of which was, *That if the ship or vessel called the Oley Frigate, &c. shall with all speed sail from the river of Thames to China, &c. without deviation, and return to the river within thirty-six calendar months, bazard of the sea excepted; and if the*

No special bail in error on a bottomree bond. 1 Lev. 117. Carth. 28. Holt 268.

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said J. S. shall, within the said thirty-six kalendar months, or thirty days after the arrival of the said ship, pay, &c. to J. S. then the obligation to be void.

Holt said, this is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions; and inclined, that it did not require special bail. *Sed adjournatur.*

* P. 261.

* Queen *versus* Dr. Wall.

A parish clerk not the parson's only, nor removable by him.

(17.) **I**N this case Holt said, that if a parish priest puts in a clerk, he cannot turn him out at pleasure: For he is then the clerk of the parish, and not the parson's clerk only.

Holt 599. 6 Mod. 253. 2 Salk. 536. Say. Rep. 160.

Queen *versus* Mickal.

No bail on a *habeas corpus* to bring up a pick-pocket, 4 Black. Com. 298, &c.

(18.) **A** MOTION was made for a *habeas corpus* to bring up the body of the defendant, charged with picking a pocket; and offered to bring unexceptionable bail; and to send down a tipstaff to enquire of his reputation.

Holt. Tho' we have a discretionary power, yet, it being certified that he was charged with the fact, I think we ought to refuse to bail him; which (on consulting his companions) he accordingly did.

At the Sittings at Guildhall, before Holt Chief Justice.

Tybbald *versus* Tregott.

Evidence. The master pays money; he is no evidence; contra of a servant. But see 1 Salk. 289. and Holt 757.

(19.) **I**N case, by a silk dyer against his servant for money received to his use; upon the evidence it appeared, that A. sending silk to be dyed by the plaintiff, the plaintiff sent his servant, the defendant, home with it, and A. paid him for every parcel as he received it; A. was produced as an evidence, that he paid the money to the defendant. But Holt would not admit his evidence; for that would be to admit a creditor to swear in discharge of himself: He said, that if a man pays money by his servant, the servant may be a witness; but that is allowed for the necessity of the thing.

* P. 262.

Taylor

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Taylor *versus* Langthorn.

(20.) **T**WAS said by Holt Ch. J. That a person who has not set his hand to the witnessing a lease, may be witness to it, if those that signed it do not appear; and so he ruled it. For in the case of a lease of years, 'tis sufficient if the lessor only signs in the witnesses presence. And so it seems in other grants of chattels. *Quære*, If so of freeholds, &c.

One not a witness may evidence a lease, &c. Ante 197. Holt 290.

And 'twas also said by him, that tho' defence be made upon a writ of enquiry, yet it would not aid a judgment, if *irregularly* obtained.

Writ of enquiry.

* Hil. Term, 1709.

* P. 263.

8 Annæ Reginae in B. R.

Memorand, Holt Ch. J. being sick, he could not attend this term, except one day, which was *Thursday*, Feb. 9.

Bishop *versus* Eagle.

(1.) **T**HE plaintiff declared upon a prohibition; and upon demurrer to the declaration, *Salkeld* took exception to it, because the declaration sets forth, that the defendant sued in the Spiritual Court, *post regiam prohibitionem ei prius inde in contrarium direct*, but does not say *deliberat*; and here appears no cause of action, since it is not set forth that the prohibition was delivered. This matter was moved last term; and this term the court was of opinion, *Holt absente*, that when you proceed for damages, then it must be set forth, that the prohibition was delivered, and also a *venue* laid: But in this case, which is only to maintain the jurisdiction of this court, it is not necessary.

Damages in prohibition; difference where you proceed for damages, and when to maintain the jurisdiction of the common law courts. Prohibition. Ante 186. 10 Mod. 22. S. C.

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Foster *versus* Burden.

* P. 264. (2.) **T**HE case was, judgment in ejectment upon a demise of three years; the defendant brings a writ of error in B. R. and the defendant in error sues * out a *scire fac'*, *quare execut' non*; to which the plaintiff in error pleads, that he has paid 200*l.* in satisfaction of the term and damages; and upon issue joined, Serjeant *Chefbire* moved to change the *venue* out of *Yorkshire* into *Middlesex*. But the court denied the motion, because the ejectment is local; and the *scire fac'* being grounded thereon, the *venue* could not be changed.

Todd & Ux' *versus* Redford.

When baron and feme to join in battery, and when not. 2 Ld. Raym. 1031. 1 Salk. 119. 6 Mod. 127. Damages. *Per quod* when the gist of the action, and when only in aggravation. (3.) **A**CTION of assault and battery is brought by the husband and wife; the declaration sets forth, that the defendant, such a day, &c. assaulted *Eleanor* the wife, and driving a coach over her, bruised her, &c. & *ratione inde*, the husband laid out *diversas denar' summas* for the cure, &c. & *al' enormia iisdem intulit ad grave damnum ipsorum*; the defendant pleaded in abatement, that his name was *Redborn*, and not *Redford*; and on issue, and verdict for the plaintiff, Serjeant *Grove* moved in arrest of judgment; and objected, that in this case, the husband and wife should not have joined, because the damage is laid to be for the money laid out in cure of the wife, as well as for the battery, and entire damages being given, 'tis bad for the whole; and cited 1 *Sid.* 328. *Yelv.* 106. 2 *Vent.* 29. 2 *Cro.* 625. 1 *Lev.* 3. But the husband should have sued alone for the money laid out in the cure.

Raymond for the plaintiff said, he agreed, the cases cited by *Grove* were so; but they are all in actions of assaults, committed by husband and wife: But in this case the tort is only upon the wife, and the *ratione inde*, &c. is only consequential damage; and so was it held in the case of *Russell v. Corn*, in assault and battery brought by husband and wife, *per quod negotia* of the husband *remanserunt infecta*; for there judgment was given for the plaintiff, because they held the *per quod* only consequential damage, which is a case in point; and the *alia enormia* are not certain enough * to have damages, and therefore it is never considered by a jury.

Powell said, That where husband and wife join in action of assault and battery for beating both, 'tis wrong; but may be helped by a verdict, separating the damages; and here the gist of the action

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action is only beating of the wife, and the *ratione inde* is only in aggravation of damages. As to the *alia enormia*, it is too general to suppose damages given for it. He said also, that husband and wife cannot join in assault and battery, *per quod consortium amisit*, for the *per quod* in such case is the gist of the action; and in the case at bar, if the *ratione inde* had been left out, the surgeon's bill might have been given in evidence, in aggravation of damages. Judgment *pro quer'*; Holt *absente*.

Anonymous.

- (4.) IF a *mandamus*, *alias* and *pluries* be issued, a return in strictness ought to be to the *pluries*; because the party is in some sort of contempt for disobeying the two first writs; yet if there be no damage to the party, a return to the original *mandamus* may be filed. Mandamus, Return. Palm. 455. Salk. 434. but now (by 9 Ann. c. 20.) the return, in certain cases, shall be made to the first writ of *mandamus*.

Queen *versus* The Parish of Kidderminster.

- (5.) MR. Bains moved to quash an order of removal; the order is directed to the overseers and church-wardens of the parish of K. and sets forth, that whereas complaint has been made by you, (and does not say whom). *Per Cur'*, 'Tis well; because it refers to the persons before-mentioned. 2d Exception was, that there is no adjudication; and upon reading the order, it appeared, that as to the place of his last legal settlement, there was a good adjudication, by saying, *it appears to us, &c.* But saying, *he is likely to become chargeable*, is no adjudication, without saying, *it appears to us, &c.*; and upon this last exception this order was quashed. Order of removal. Vide ante 64, 5. and the authorities there cited. No complaint. Adjudication.

* Anonymous.

* P. 266.

- (6.) MR. Pengelly moved to quash an order made by two justices; his exception was, that it does not appear, that they were justices for that county; for it is set forth to be made by A. and B. two justices *com' præd'*, and here is no county in the body of the order for the *præd'* to refer to, and it shall not refer to the county in the margin; whereupon it was quashed *per cur'*. Order of two justices quashed. but see Burr. Set. Caf. p. 199, &c.

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Queen *versus* Cecill.

Order to pay
wages in hus-
bandry.
Ld. Raym.
1305. S. C.

upon the oath
of the party.

(7.) **M**R. Gilbert moved to quash an order of sessions, made upon the master to pay 7*l.* wages to J. S. his servant in husbandry, and made two objections to the order; 1. That J. S. was a covenant servant, and the statute does not extend to such, though in husbandry. 2. That the order appears to be made upon the oath of J. S. the servant, which is contrary to the rule of evidence, that the servant's oath should be taken in his own cause; and as to its being set forth, that 'tis upon hearing of counsel, that does not alter the case. Besides, there may be other evidence; for though perhaps others cannot prove the contract, yet they may prove the service.

Lutwych cont. This is not to be bound by that rule; for here is a power given by an act of parliament, for the benefit of poor servants. Besides, it does not appear that there was other evidence, and here is an adjudication, that so much is due. This is done every day, on orders for the settlement of poor people, upon the party's single oath.

Raymond in answer to *Lutwych*. This is not like the case of settlements, for 'tis indifferent to the party where he is settled.

To Mr. Gilbert's first objection, *Powell J.* held, that the Stat. 5 *Eliz.* having a favourable construction, has been * extended to covenant servants, if in husbandry. As to the second, he would not take it, that there was other evidence; that he believed the wages were certain in most counties, and the way is to examine the time of service by others, and the justices to adjust the *quantum*. We allow a man to be evidence in his own cause for necessity, as in the statute of hue and cry; but here may be other evidence. (*Nota*; The justices at sessions are to appoint statute wages.) But 'twas quashed; *Holt absente*.

Parish of St. Saviour's Southwark, *versus* The Parish of Cripplegate.

Place of birth
a good settle-
ment.
Burn. tit Set-
tlement by
birth. 3 V.
p. 300, &c.

(8.) **B**ONNICK moved to quash an order of sessions, made to remove a child of three years old to the place of its birth; and his exception was, that it should have been sent to the place where the father was settled; because the settlement of the father is the settlement of the child.

The order [now first published] was as follows:

To

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To the churchwardens and overseers of the poor of the parish of *St. Giles* without *Cripplegate*, in the county of *Middlesex*; and also to the church-wardens and overseers of the poor of the parish of *St. Saviour* in *Southwark*, in the county of *Surry*, or any of them.

WHEREAS it appeareth unto us, two of her Majesty's justices of the peace for the said county of *Middlesex*, *quorum unus*, Upon the complaint of the church-wardens and overseers of the poor of the parish of *St. Giles* without *Cripplegate* aforesaid, that *Martha* the wife of *John Robinson*, with her husband's child (named *James*) about three years old, is lately intruded and come into their said parish; endeavouring to settle and remain there, without renting 10*l.* *per annum*, or paying any parish taxes there, or giving notice in writing to any of the officers thereof, of the place of her abode, as by law she ought: *And whereas* it appears unto us, the said justices of the peace, that by reason of the poverty of the said *Martha Robinson*, she having nothing wherewith to maintain her said young child, the said young child now is and unavoidably will be a great charge to the said parish of *St. Giles* without *Cripplegate*, if not speedily prevented: *And whereas* it also appeareth unto us, the said justices of the peace, upon the examination of the said *Martha Robinson*, mother of the said young child, upon oath, That about three years ago, she and her said husband *John Robinson* lived in the parish of *St. Saviour Southwark* aforesaid, in the county of *Surry* aforesaid, and were house-keepers there for the space of nine months; and *there* her and her said husband's young child (named *James*) was born: And that she does not know any other place of her said husband's legal settlement, nor can we now, upon a strict examination, find any other legal settlement of the said *John Robinson*, or his said wife, since their living in the said parish of *St. Saviour, Southwark*. We therefore the said justices do adjudge and deem, the said parish of *St. Saviour Southwark*, to be the place of the legal settlement of the said *James Robinson* the said young child, and son of the said *John* and *Martha Robinson*, by reason the said young child was born there; no other place of his said father's or mother's legal settlement appearing unto us: And that the said *James Robinson*, the said young child, ought to be sent to the said parish of

1

St.

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St. Saviour Southwark. These are therefore, in her Majesty's name, to require you, on sight hereof, to pass, remove and convey the said *James Robinson*, the said young child, from out of the said parish of *St. Giles* without *Cripplegate*, to the parish of *St. Saviour Southwark* aforesaid; and him to deliver to the church-wardens and overseers of the poor there, or to some or one of them, together with this precept: Who are hereby required to receive and provide for him, as his occasions shall require, and as they do for other poor of their said parish, until they can otherwise free themselves thereof by due course of law. And this is your warrant. Given under our hands and seals this 18th day of *August*, A. D. 1709.

Northey to maintain the order said, that it had been often adjudged, that the place of birth is a settlement, and good, till the settlement of the father is found out; and 'tis possible the father might have no settlement, as if he was an *Irishman*, or an alien, and has got no settlement here, in which cases, the place of birth is the settlement of the child.

Bastards.

Children under seven years old.

* P. 268.

Powell: The place of birth is the settlement of a bastard-child; but a legitimate child is part of the father's family, and must be settled with him; but if the father's settlement cannot be found, then the place of its birth is its settlement. Therefore if a child be dropped in the parish of *A.* and that parish cannot find the settlement of the father, they shall send it to the place of its birth, and that place must find out the father's settlement, or keep the child. As to the case of nurse-children, it has always been holden, that children under seven years shall go along with the mother: Therefore if a man settled in the parish of *A.* marry a widow in the parish of *B.* who * has divers children under seven years, and settled in the parish of *B.* the children shall go along with the mother to the parish of *A.* but this is only for nurture, and they shall gain no settlement; but the parish of *B.* shall take them again, when above the age of seven years; and if they become chargeable, the parish of *B.* shall pay for their keeping, tho' they still remain with the mother. To which *Powis* and *Gould* agreed; so the order was affirmed; *Holt absente.*

Parish of Binfield *versus* Banstead.

Order of removal, ill directed.

(9.) *EYRE* Solicitor General moved to quash an order of removal made by two justices; his exception was, that 'twas wrong directed; for it was directed to the church-wardens, &c. of *Binsted*, and to the church-wardens, &c. of *Banstead*, and whom it may concern; also it is not said who to convey or who

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who to receive. The court seemed to incline, that it ought to be quashed. *Sed adjournatur.*

Queen *versus* Davison.

(10.) **A**N order of two justices to compel *Davison* to allow so much a week for the maintenance of his wife and family. Mr. *Nott* moved to quash the order, for that the justices have not jurisdiction in this case, it being properly alimony, and belonging to the Spiritual Court. And *Holt* being absent, *Powell* said, that the justices have no jurisdiction in this case, but this is not alimony. If a man runs away from his family, he may be punish'd as a rogue and a sturdy beggar; but whilst he continues resident, they cannot charge him in this manner; and quash'd the order.

Order to compel the husband to allow for the maintenance of his wife and family, quashed.
1 Inst. 235.
12 Rep. 30.

Parish of St. Benedict *versus* The Parish of St. Peter's * P. 269. in Norwich.

(11.) **S**IR *James Montague* Attorney General moved to quash an order of two justices of the peace, for the county of the city of *Norwich*, made upon the stat. 43 *Eliz.* which enacts, That if any parish is not able to maintain its poor, that then two justices may tax other parishes and places, and the whole hundred also, (if need requires); and where the hundred is not able, justices in sessions may tax the county in part or wholly at their discretions.

Order made upon stat. 43 *Eliz. c. 2.* to assess the whole hundred for relief of the poor.
Foley 31.
S. C.
2 Salk. 480.
1 Str. 56.

His exception to the order was, that it does not appear that the parishes taxed are within the hundred; for it is only said, that they are within the county of the city of *Norwich*; and two justices by the act have not power to tax the county, but only the hundred, or the parishes within the hundred.

Sir Edw. Northey cont. If two justices cannot relieve in this case, there can be no relief given; for 'tis well known there are no hundreds within cities, and the city and the county of the city are the same. Indeed *London* has wards which resemble hundreds, but no other city; and the power given to the justices in sessions must arise upon a defect in the hundred; and where there is no hundred there can be no such defect; and that the sessions could have made no order in this case.

Mr. *Raymond*, the same side with *Sir Edward Northey*. The question is, whether a city is within the statute? for the session's jurisdiction arises only upon the insufficiency of the hundred. This statute is only a directory and remedial law; and as in the case of the statute of hue and cry, which directs, that oath shall

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be made before a justice of the hundred, where the felony was committed, yet this may be to the next justice, tho' not of the hundred.

* P. 270. * *Powell*: This is not *casus omissus* out of the statute; and tho' the two justices have not power, here being no hundred, yet the sessions have a jurisdiction, and may tax the county of the city in part or at large. To which the rest agreed, and, *Holt absente*, quash'd the order; being made by two justices only.

Anonymous.

Motion to
bring money
into court.
2 Burr. 1120,
1.

(12.) **I**N an action brought upon a policy of insurance, *Pengelly* moved for leave to bring 15 *l.* into court, being as much as they thought their average of the damage came to, (the goods not being lost, but only damaged); and so the plaintiff to proceed upon peril of costs. *Powell*: The motion cannot be granted, tho' we have granted it in a *quantum meruit*, and also in covenant for payment of money: But in covenant for repairs we have denied it; and so we must here.

Queen versus Lane.

Mandamus.
2 *Ld. Raym.*
1304.
Fortesc. 275.
S. C.
Writing a li-
bel, no cause
of removal
till convic-
tion.

Resignation
may be by
parol.

* P. 271.

(13.) **A** *Mandamus* directed to the corporation of *Gloucester*, to restore *Lane* to the place of a capital burghess; they return, that *Lane* wrote a certain scandalous letter to one of the aldermen, amounting to a libel; and being charged therewith at a court held, &c. he consented to be turned out. *Per Cur'*, The common council are not judges of a libel; for that is only triable at common law. And suppose it be a libel, he should be convicted of it at common law before it can be alledged as a cause of removal; and as to his resignation, if they had designed it to be a cause of removal, it should have been returned otherwise; for here they summoned him to shew cause why he should not be turned out for writing a libel; and he appears and says, You may turn me out if you will, but I will bring a *mandamus*, and so he does; This certainly is no resignation. Tho' a resignation may be by parol, according to Sir *Jonathan Jennings's* case; * but then it ought to have been returned more certain and solemn. So the court granted a peremptory *mandamus*; *Holt absente*.

Queen

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Queen *versus* Shepherd.

(14.) **M**R. Raymond moved to amend a faulty inquisition of a *felo de se*, (not saying *super visum corp'*); he said, this is like the case of a caption of an indictment, which may be amended; and cited 1 Sid. 225, 229. Amendment of an inquisition. Holt 167. 367. 6 Mod. 95.

Sir Edw. Northey cont. The farthest they can go is to amend the caption of an indictment. But it was settled in the case of the *Queen versus Burdy*, 7 *Annæ Reginæ*, that an inquisition cannot be amended.

Powell. The coroner can amend only matter of form.

Nota; Some other exceptions were, *viz.* that it is said to be taken *coram coronatoribus Dom' Reg'*, but does not say for what place; and that 'tis said, *per sacramentum duodecim virorum A. B. C.* without *proborum & legalium hominum*, nor for what place. Exceptions to an inquisition.

Mr. Raymond, seeing the court was against him, moved to quash the *certiorari*; because it sets forth, that there was an inquisition *nuper capt'*, (and the common form is only *capt'*); and it appears upon the return to be taken after the *teste* of the *certiorari*, for that is 28 Nov. 8 *Annæ Reginæ*, and the inquisition is 4 Jan. and it being *nuper capt'*, shall tie it down to an inquisition taken before. Certiorari teste before the inquisition.

Sir Edward Northey cont. The *certiorari* is well, as writs of error may be taken out before any judgment given, and yet well.

Powell, (Holt *absente*), *Capt'* and *nuper capt'* the same in this case. 'Tis usual to take out *certiorari*'s before the inquisition is found, as a writ of error may be taken out as soon as the action commences. 2.

Then Mr. Raymond desired to have a *melius inquirend'*. But *per cur'*, It is not usual to grant one in this case; for the inquisition must be *super visum corporis*. Let the inquisition be quashed; and if you will have a *melius inquirend'*, * it must be upon another motion, and not grafted upon this. * P. 272.

Hern *versus* Dryden, or Drake.

(15.) **D**E B T upon an arbitration-bond; the award was that the defendant should make an assignment sufficient in law of J. S. his apprentice, to the plaintiff; and it was resolved by the court, *viz.* Powell, Powis and Gould, (Holt *absente*), That the award was ill; because the assignment could Award to assign over his apprentice, void. 1 Salk. 68. This case is cited by ch. j. Lee in Bax-ster v. Burfield, under the names Storus v. Blake. 2 Str. 1267.

not

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Custom of
London.

not be without the assent of the apprentice; and an award for a man to do a thing which is not in his power to do, without the consent or concurrence of another, is void. *Powell* justice said, That by the custom of *London*, if a master leaves off trade, he may assign over his apprentice, but then the apprentice may chuse his master; but such assignment will not hold in any other place.

Anonymous.

Bailiffs of Liberties and sheriffs, what punishment for not returning writs. but see Bro. ret. brev. 89, 99. Ante 49.

(16.) **I**T was held by *Powell*, *Powis* and *Gould* assenting, (*Holt* Ch. J. absent), that this court cannot amerce bailiffs of liberties, for not returning of writs, &c. But the court can make a rule for them to make a return, and for disobeying that, bring them into contempt; but sheriffs, and all that are officers of the court, the court can amerce. Lately indeed we did amerce the bailiff of *Westminster*; but that was wrong.

Anonymous.

Writ of error (*sans notice*) a *superfedeas* to execution. Ante 107. 3 Lev. 312. 1 Vent. 30. 1 Burr. 340. * P. 273.

(17.) **M**OTION to set aside an execution, executed, after a writ of error allowed; the court held, that tho' there was no notice given to the plaintiff's attorney, of the allowance of the writ of error, yet it was * a *superfedeas* to the execution: But to bring the attorney into contempt, he must have had notice. Motion granted.

Queen *versus* Depuke.

Forcible entry upon the estate of J. S. and does not shew what estate J. S. has. F. N. B. 248. C. 1 Salk. 260. Tenant at sufferance not within the statute.

(18.) **M**R. *Raymond* moved to quash an indictment of forcible entry; which sets forth, that the defendant entered forcibly into the close of J. S. and turned him out; whereas before the time J. S. *possessionatus* fuisse *de termino ult' elaps'*; his exception was, that the estate of J. S. should have been particularly set forth, for he might have been tenant at sufferance; and it has been often adjudged, that tenant at sufferance is not within the statute of forcible entries; likewise he said, that by the word *fuisse*, it does not appear, but that the estate of J. S. was determined before the entry. *Ergo* quashed *per cur*; *Holt* *absente*.

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Queen *versus* Brown.

(19.) **T**HE defendant was indicted for not repairing a highway; he pleaded, that the inhabitants of *D.* ought to repair it, *absque hoc*, that he ought, whereupon issue being joined, the defendant offered to give in evidence, that it was not a highway. But verdict being against him, and that point saved, at the assises of *York*, for the opinion of the court; this term it was resolved by *Powell*, *Powis* and *Gould*, upon the motion of *Lutwyche*, that this ought not to have been given in evidence; because the defendant had confessed it to be a highway by his plea; for if he would have contested that point, he should have pleaded not guilty.

Highway.
Confession by
pleading.
Holt 338.

Leuknor *versus* Plant.

(20.) **C**ASE, the plaintiff declares, that the defendant *Sarah*, being a common carrier, and using to carry goods *pro mercede* between *Worcester* and *Litchfield*, * the plaintiff delivered to her a guinea, to carry and deliver to her son *T.* and that *Sarah*, the defendant, in consideration of so much for carriage, promised the plaintiff *Alice quod ipsa eadem Sara denar' præd', &c. salvo portaret, & eisdem eidem T. cum postea requisit' esset deliberaret, præd' tamen Sara non deliberasset, licet eadem Sara sæpius per eandem Aliciam requisit' fuit, sed ill' eidem Aliciæ deliberare præfat' Sara omnino recusavit, &c.* After verdict for the plaintiff, it was moved in arrest of judgment, and objected by *Mr. Raymond*, that the *narr'* sets forth no breach of promise, for there is no request to pay to *Thomas*, to whom the money is to be delivered; and if no breach, then no cause of action: And tho' the plaintiff in this case might have countermanded the gift, any time before an action brought by *T.* and consequently might have had an action for it against the defendant, yet that action must not have been case, but trover or detinue; and therefore here is no foundation for this special action, without shewing a request to deliver it to *Thomas*.

Assumpsit, and
no breach al-
leged.
Cro. Jac. 183,
523.
1 Jon. 56.
* P. 274.

Sed per cur', It being said generally, that she requested the defendant to deliver it, tho' not said to whom, and it being after verdict, they held it well; and gave judgment for the plaintiff; *Holt ægroto.*

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Foster *versus* Burdett.

Pleas and
pleadings.
False pleas
in bar to a
scire facias
quare execut'
non, rejected.
Carth. 40,
41. but see
Yelv. 6, 7.

(21) **W**RIT of error out of C. B. the defendant in error sues a *scire facias quare execut' non*, &c. to which the plaintiff pleads a sham plea in bar; and *Mason* moved, that the plea might be rejected; and *per Powell* Just. tho' the plaintiff may plead false pleas in bar, such pleas not being within the statute for the amendment of the law, so as to compel the party to make oath of the truth of his plea; yet since this *scire facias* is only to compel the plaintiff to assign errors, the court will not suffer such pleas, whereby the defendant is delayed of his execution; for if such pleas are allowed, the court cannot make a rule to assign errors till the plea be determined. * Therefore if, upon two *nibils*, or a *scire feci* returned, the plaintiff do not come and assign errors, or plead a good plea to the *scire facias*, the court will give rules to assign errors, or *nonpross* him upon the writ of error.

* P. 275.

Sham error.

This plea being rejected, at another day in this term the plaintiff assigned his errors, which appeared to be no errors; and since it was only for delay, the counsel for the defendant moved they might be rejected. But his motion was denied *per cur'*; *Holt absente*. [It seems the court intended to let the original plaintiff have his execution, for want of assigning errors.]

Ode *versus* Young.

Judgment
ideo considerat'
and not *per*
cur'.

(22.) **J**UDGMENT in an inferior court reversed; for that it was, *ideo consideratum est*, and not said *per cur'*.

Bishop *versus* Morgan.

Obligation
with a blank.
Cro. El. 886.

(23.) **D**EBT upon a bond; and upon oyer the defendant demurred, and shewed for cause, that the bond was void, being *Noverint universi, &c. me J. S. teneri & firmiter obligari Richardo — de Woodstreet, &c. solvend' eidem Richardo Bishop*. But the court held the bond good; and gave judgment for the plaintiff.

Anonymous.

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Anonymous.

(24.) **M**R. *Jenkins* moved for a special *ac etiam* in trespass, for *Ac etiam*.
lying with the plaintiff's wife, which was granted;
and held the defendant to 50*l.* bail.

N. B. Affidavits were produced of the *indecent liberty* they took
together.

* *Riley versus Adams.*

* P. 276.

(25.) **D**EBT upon a bond conditioned to perform covenants
in an indenture, wherein the defendant, being a par-
son, covenanted to let the plaintiff enjoy the rectory, which the
defendant, as parson, had demised to him; the defendant pleads
performance generally; the plaintiff replies, and shews a breach,
that the defendant resigned the benefice into the hands of the bi-
shop, by which he could not hold the rectory; the defendant
rejoined, that he did not resign; upon which issue is joined; and
upon the trial at *Guildhall*, before *Powell J.* the plaintiff gave in
evidence the defendant's answer in Chancery, wherein he con-
fessed he signed a resignation, &c. *Sed per Powell J.* This is not
sufficient without also proving that the bishop accepted it; and for
want of such proof, the plaintiff was nonsuit.

Issue, resigna-
tion or not,
must prove
acceptance.
The plead-
ings, in this
cause, are in
Lil. Entr.
118.

Note; Upon producing the bill in Chancery, *Whitacre* object-
ed, that it could not be read as evidence, not being taken off the
file, but only from the custody of one of the six clerks. But
Powell said, it might be read, (on swearing the clerk), and so
it had always been held.

When a bill
in Chancery
may be read
as evidence.
Bul. Ni. Pri.
235, &c.

Memorand; Soon after the end of this term the lord chief justice
Holt died; and was, in the following term, succeeded by Sir
Thomas Parker, knight and serjeant at law; afterwards Earl of
Macclesfield, and lord chancellor of Great Britain.

De quo dicendum est!

SUPPLE-

SUPPLEMENT of Cases, adjudged in the Reign of Queen *Ann*; and now first published from the Manuscript of Mr. *T. Lutwych*.

Scattergood *versus* Edge.

De termino Sanctæ Trinitatis, anno regni domini Gulielmi tertii, nunc regis Angliæ, duodecimo.

12 Mod. 278.
Salk. 229.
Eq. Caf. Abr.
189. S. C.
But not so
fully report-
ed.

DOMINUS rex mandavit dilecto et fideli suo Georgio Treby militi, capitali justiciario suo de banco, breve suum clausum in hæc verba, (scilicet); Gulielmus tertius, Dei gratiâ, Angliæ Scotiæ Franciæ et Hiberniæ rex, fidei defensor, &c. Dilecto et fideli nostro Georgio Treby militi, capitali justiciario nostro de banco, salutem. Quia in recordo et processu, ac etiam in redditione judiciû, loquelâ quæ fuit in curiâ nostrâ, coram vobis et sociis vestris justiciariis nostris de banco, per breve nostrum, inter Johannem Scattergood et Ricardum Edge nuper de Marston Mongerberry in comitatu Derby generosum, de quibusdam transgressionibus et ejectione firmæ, eidem Johanni per præfatum Ricardum illatis, ut dicitur, error intervenit manifestus, ad grave damnum ipsius Johannis, sicut ex querelâ suâ accepimus: Nos, errorem si quis fuit, modo debito corrigi, et partibus prædictis plenam et celerem justiciam fieri, volentes in hac parte, vobis mandamus, quod si judicium inde redditum sit, tunc recordum et processum prædicti, cum omnibus ea tangentibus, nobis sub sigillo vestro distinctè et apertè mittatis, et hoc breve, ita quod ea habeamus in crastino Sanctæ Trinitatis, ubicunque tunc fuerimus in Angliâ, ut, inspectis recordo et processu prædictis, ulterius inde pro errore illo corrigendo fieri faciemus, quod de jure et secundum consuetudinem regni nostri Angliæ fuerit faciendum. Teste meipso apud Westmonasterium, sexto die Maii anno regni nostri duodecimo.

Terry.

RESPONSIO Georgii Treby militis, capitalis justiciarii infranominati.

Recordum et processum loquelæ unde infra fit mentio, cum omnibus ea tangentibus, coram domino rege ubicunque, &c. ad diem infra-contentam, mitto in quodam recordo huic brevi annexo, prout interius mihi præcipitur.

Geo. Treby.

PLACITA irrotulata apud Westmonasterium coram Georgio Treby milite et sociis suis, justiciariis domini regis de banco, de termino Sanctæ Trinitatis anno regni domini Gulielmi tertii, Dei gratiâ Angliæ Scotiæ Franciæ et Hiberniæ regis, fidei defensoris, &c. octavo. Rotulo 1424.

Narratio.

Nottinghamia (scilicet). Ricardus Edge nuper de Marston Mongerberry in comitatu Derby generosus attachiatus fuit ad respon-

respondendum Johanni Scattergood, de placito quare, vi et armis, maneria de Strelly, Bilborough, Ratcliffe super Trent, Londham et Gunthorpe, cum pertinentibus, in comitatu Nottinghamiæ; et sex messuagia, sex cottagia, decem tosta, mille acras terræ, mille acras prati, sexcentas acras pasturæ, et centum acras bosci, cum pertinentibus, in Strelly, Bilborough, Ratcliffe super Trent, Londham et Gunthorpe prædictis, et in Lenten, Arnold, Southwell, et Upton, in comitatu Nottinghamiæ prædicto, quæ Eliza Jaques et Maria Jaques spinsteræ dimiserunt eidem Johanni ad terminum qui nondum præteriit, intravit; et ipsum à firmâ suâ prædictâ ejecit; et alia enormia ei intulit, ad grave damnum ipsius Johannis, et contra pacem dicti regis nunc, &c. Et unde idem Johannes, per Johannem Thorpe attornatum suum, queritur, Quare cum prædictæ Eliza et Maria vicesimo die Aprili anno regni domini regis nunc octavo, apud Strelly in comitatu prædicto, dimississent eidem Johanni Scattergood maneria et tenementa prædicta cum pertinentibus; habendum et occupandum maneria et tenementa prædicta, cum pertinentibus, eidem Johanni Scattergood et assignatis suis, à nonodecimo die Aprili tunc ultimo præterito, usque finem et terminum quinque annorum extunc proxime sequentium, et plene complend' et finiend': Virtute cujus quidem dimissionis idem Johannes Scattergood in maneria et tenementa prædicta intravit, et fuit inde possessionatus: Ipsoque Johanne Scattergood sic inde possessionato existente, prædictus Ricardus Edge postea videlicet eodem vicesimo die Aprili anno octavo supradicto, vi et armis, &c. in maneria et tenementa prædicta cum pertinentibus, quæ prædictæ Eliza et Maria eidem Johanni Scattergood in formâ prædictâ dimiserunt, ad terminum prædictum qui nondum præteriit, intravit; et ipsum Johannem Scattergood à firmâ suâ prædictâ ejecit: Et alia enormia, &c. ad grave damnum, &c. et contra pacem, &c. Unde dicit quod deterioratus est, et damnum habet ad valentiam viginti librorum, et inde producit sectam, &c.

Et prædictus Ricardus Edge, per Josephum Haynes attornatum suum, venit et defendit vim et injuriam, quando, &c. et dicit quod ipse in nullo est culpabilis de transgressione et ejectione prædictis, prout prædictus Johannes Scattergood superius versus eum queritur: Et de hoc ponit se super patriam; et prædictus Johannes Scattergood similiter. Ideo præceptum est vicecomiti, quod venire faciat hic, à die Sanctæ Trinitatis in tres septimanas, duodecim, &c. per quos, &c. et qui nec, &c. ad recognizandum, &c. quia tam, &c. Ad quem diem jurata inter partes prædictas, de prædicto placito, posita fuit inde inter eas in respectu hic usque ad hunc diem, scilicet à die Sancti Michaelis in tres septimanas tunc proxime sequente, nisi justiciarii domini regis, ad assisas in comitatu prædicto capiendas assignati, per formam statuti, &c. die Veneris vicesimo sexto die Julii ultimo præterito, apud Nottingham in comitatu Nottinghamiæ, prius venissent. Et modo hic ad hunc diem venerunt tam prædictus Johannes Scattergood quam prædictus Ricardus Edge per attornatos

Placitum
'non culpabi-
'lis.'

Issue sur ceo.

Postea de le
nisi prius.

Specialis ve-
redictus;
quod Ralph
Edge fuit sei-
situs *en fee*.

Et 3^{mo} Sep.
1684. fecit
son volunt.

Le volunt;
per quod il
done les pre-
misses, &c.
al trustees pur
11 ans.

natos suos prædictos, &c. et præfati justiciarii, ad assisas coram, &c. miserunt hic recordum suum in hæc verba; Postea die et loco infra-contentis, coram Johanne Powell juniore milite, uno justiciariorum domini regis de banco, et Georgio Dodson armigero, eidem Johanni Powell et Nicholo Lechmere militi, uno baronum scaccarii dicti domini regis, (justiciariis ipsius domini regis, ad assisas in comitatu Nottinghamiæ capiendas assignatis, per formam statuti, &c.) hac vice associato; præsentia prædicti Nicholi Lechmere non expectatâ, virtute brevis dicti domini regis de '*si non non omnes*,' &c. veniunt tam infra-nominatus Johannes Scattergood quam infra-scriptus Richardus Edge, per attornatos suos infra contentos; et juratores juratæ, unde infra fit mentio, exacti, similiter veniunt; qui ad veritatem de infra contentis dicendam electi, triati, et jurati, super sacramentum suum dicunt, Quod diu ante prædictum tempus transgressionis et ejectionis prædict', superius fieri supposit', quidam Radolphus Edge armiger seiscitus fuit in dominico suo ut de feodo de et in prædictis maneriis et tenementis, cum pertinentibus, in narratione infra-scriptâ specificatis; et sic inde seiscitus existens, prædictus Radolphus condidit testamentum et ultimam voluntatem suam, in scriptis, gerentem datum tertio die Septembris, anno regni domini Caroli secundi, nuper regis Angliæ, &c. tricesimo sexto, et juratoribus prædictis in evidentiâ ostensam; quæ quidem ultima voluntas sequitur in hæc verba; (scilicet,) "In the name of God, amen: I *Ralph Edge of Strelly, in the county of Nottingham, Esq;*" [*et quant al premisses en question il devise en ceux parolles.*] "And as for my real and personal estate, where- with God hath blessed me, I give devise and bequeath the same in manner following, (that is to say); all and singular my manors, or reputed manors, of *Strelly* afore said, *Bilbrough, Ratcliffe upon Trent, Londbam, and Guntborpe*, in the said county of *Nottingham*; and all and every my messuages, farms, cottages, coal mines, mills, tythes, lands, tenements, and hereditaments whatsoever, in *Strelly, Bilbrough and Ratcliffe upon Trent, Londbam, and Guntborpe* afore said, and in the town of *Nottingham, Lenton, Arnold, Southwell, and Upton*, in the said county of *Nottingham*, I give and devise the same unto *Edward Bigland, Esq;* serjeant at law, and *Thomas Charleton, the elder, of Nottingham* afore said, *Esq;* and *John Strey of Becton*, in the county of *Nottingham*, Gent. or the survivors or survivor of them, for and during the term of eleven years next after my decease; upon trust, that they shall, out of the rents issues and profits of the same premisses, pay and satisfy all my debts, legacies, and funeral expences, which my personal estate shall not be sufficient to discharge; and the surplusage of such rents, issues and profits, and the monies thereupon arising, which shall remain at the end or expiration of the said term of eleven years, to dispose of the same as I shall direct, by any deed or writing under my hand and seal, testified by three or more credible witnesses. I give and devise

" the

“ the said manors, farms, messuages, cottages, coal mines, mills,
 “ tythes, lands, tenements and hereditaments, to the first son
 “ of the body of my nephew *George Jaques*, and the heirs males
 “ of his body issuing; and for default of such issue, to the se-
 “ cond and all other the sons of the said *George Jaques*, and the
 “ heirs males of their respective bodies issuing. So always pro-
 “ vided, and upon this condition, that all and every such sons
 “ of the said *George Jaques*, and the heirs males of their respec-
 “ tive bodies, to whom the same premisses shall, according to
 “ the devise aforesaid, remain and come, shall and do take up-
 “ on him and them my surname of *Edge*, and shall and do con-
 “ tinue the same: But in case they shall refuse to take my sir-
 “ name, and continue the same as aforesaid, or in case all the
 “ sons of the said *George Jaques* shall die without issue male of
 “ their bodies issuing; then I give and devise the same to the
 “ first son of the body of *Richard Conway*, of *Marston Mongerberry*
 “ in the county of *Derby*, gentleman, and the heirs males of his
 “ body issuing; and for default of such issue, to the second and
 “ all other the sons of the said *Richard Conway*, and the heirs
 “ males of their respective bodies issuing; so always provided,
 “ that all and every such sons of the said *Richard Conway*, and
 “ the heirs males of their respective bodies, to whom the same
 “ premisses shall, according to the devise aforesaid, remain and
 “ come, shall and do take upon him and them my surname of
 “ *Edge*, and shall and do continue the same as aforesaid: But in
 “ case they shall refuse to take my surname, and continue the
 “ same as aforesaid, or in case all the sons of the said *Richard*
 “ *Conway* shall die without issue male of their bodies issuing;
 “ then I give and devise the same to *Peter Edge* of
 “ in the county of *Suffex*, clerk, for and during the term of his
 “ natural life; and from and after his decease, to and for the
 “ first son of the body of him the said *Peter Edge*; and for de-
 “ fault of such issue, then to the second and all other the sons
 “ of the said *Peter Edge*, and the heirs males of their respec-
 “ tive bodies; and for default of such issue, then to the right
 “ heirs of me the said *Ralph Edge* for ever.” [Et apres il done
 divers rent-charges, destre pay hors del dits tenements, durant le
 terme; et fesoit William Taylor & Jaques Holland, (deux servi-
 teurs) executors, d'accountes al dits trustees: Et done divers autres
 legacies.] Et iidem juratores, super sacramentum suum prædictum
 ulterius dicunt, quod prædictus Radolphus Edge, sic inde seisi-
 tus existens, postea scilicet septimo die ejusdem mensis Septem-
 bris, anno Domini 1684. supradicto, apud Strelly prædictum in
 comitatu Nottinghamiæ, obiit: Et quod prædictus Georgius Jaques,
 in prædicto testamento et ultimâ voluntate Radolphi
 Edge nominatus, nunquam habuit aliquem exitum masculinum
 de corpore suo exeuntem: Et quod prædictus Georgius Jaques,
 decimo-quarto die Maii anno Domini 1688, apud Strelly præ-
 dictum, obiit. Et iidem juratores ulterius super sacramentum
 suum prædictum dicunt, Quod Ricardus Edge, in narratione in-
 fra-

Remainder
 (sans asum
 reference, al
 termin pur ans)
 al primer fits
 de George
 Jaques en
 taile maile
 Proviso.

Donques al
 primer fits de
 Richardus
 Conway en
 taile male,
 ove remain-
 ders al auters
 fits del dit
 R. C. en
 taile male.

Remainder
 al Peter
 Edge en taile
 male.

Remainder
 al droit heirs
 del devisior.

Quod le tes-
 tator moruist
 seifitus.

Quod Geor-
 gius Jaques
 nunquam ha-
 buit fits.

Sed moruist
 en 1688.

Quod le de-
 fendant est
 fra-

primer fils de
Ricardo Con-
way.

Quod les
trustees intra-
verunt pur
les 11 ans.

Et quod sur
expiration de
ceo le defen-
dant intravit,
&c.

Quod les
lessors sunt
hæredes al-
ley del tes-
tator.
Et intrave-
runt et dimi-
serunt al que-
rent.

Et si, &c.

fra-scriptâ mentionatus, est primus filius Ricardi Conway in tes-
tamento et ultimâ voluntate prædicti Radolphi Edge superius men-
tionati; et natus fuit ante confectionem prædicti testamenti et
ultimæ voluntatis prædicti Radolphi Edge: Et quod ipse præ-
dictus Ricardus Edge, ab et post mortem prædicti Georgii Jaques
in testamento et ultimâ voluntate prædicti Radolphi Edge men-
tionati, suscepit super se cognomen suum de Edge, et abinde
hucusque per idem cognomen appellari continuavit, et adhuc
continuat. Et iidem juratores ulterius super sacramentum suum
prædictum dicunt, Quod post mortem præfati Radolphi Edge,
præfati Edwardus Bigland, Thomas Charleton et Johannes Strey
in maneria et tenementa prædicta, cum pertinentibus, intrave-
runt, et fuerunt inde possessionati; et maneria et tenementa
prædicta, cum pertinentibus, pro prædicto termino undecim an-
norum post mortem præfati Radolphi Edge habuerunt et gavisi
fuerunt: Quodque prædictus Ricardus Edge ad expirationem
prædicti termini undecim annorum, in maneria et tenementa
prædicta cum pertinentibus intravit, et fuit inde possessionatus,
prout lex postulat: Quodque prædictæ infra-scriptæ Eliza Jaques
et Maria Jaques, dimissores querentis, sunt proximæ et legitimæ
hæredes prædicti Radolphi Edge, devisoris. Et iidem juratores
ulterius super sacramentum suum prædictum dicunt, Quod præ-
dicto Ricardo Edge sic inde seiscito existente, prædictæ Eliza et
Maria, vicesimo die Aprili, anno regni domini regis nunc octavo,
apud Strelly in comitatu prædicto, in maneria et tenementa præ-
dicta, super possessionem ipsius Ricardi Edge, intraverunt; et
adtunc et ibidem dimiserunt prædicto Johanni Scattergood ma-
neria et tenementa prædicta, cum pertinentibus; habendum et
occupandum maneria et tenementa prædicta, cum pertinentibus,
eidem Johanni Scattergood, et assignatis suis, a decimo nono die
Aprili tunc ultimo præterito, usque finem et terminum quinque
annorum extunc proxime sequentium, et plene complend' et
finiend': Virtute cujus quidem dimissionis prædictus Johannes
Scattergood in maneria et tenementa prædicta cum pertinentibus
intravit, et fuit inde possessionatus; ipsoque Johanne Scattergood
sic inde possessionato existente, prædictus Ricardus Edge postea
scilicet eodem vicesimo die Aprili, anno octavo supradicto, vi et
armis, &c. in maneria et tenementa prædicta cum pertinentibus,
quæ prædictæ Eliza et Maria eidem Johanni Scattergood in for-
mâ prædictâ dimiserunt, ad terminum prædictum qui nondum
præteriit, intravit; et ipsum Johannem Scattergood a firmâ suâ
prædictâ ejecit, prout prædictus Johannes Scattergood per narra-
tionem suam infra-scriptam inde supponitur. Et si super totam
materiam prædictam, per juratores prædictos in formâ prædictâ
compertam, videbitur curiæ dicti domini regis, nunc hic, quod
prædictus Ricardus Edge est culpabilis de transgressione et ejec-
tione infra-scriptis, interius specificatis, tunc iidem juratores di-
cunt, super sacramentum suum, Quod prædictus Ricardus Edge
est culpabilis de transgressione et ejectione prædictis, prout præ-
dictus

dictus Johannes Scattergood interius versus eum queritur; et assidunt damna ipsius Johannis Scattergood, occasione transgressionis et ejectionis ill' ultra missa et custagia sua, per ipsum circa sectam suam in hac parte apposita, ad sex denarios, et promissis et custagiis illis, ad quinquaginta et tres solidos et quatuor denarios. Sed si, super totam materiam prædictam, per juratores prædictos in formâ prædictâ compertam, videbitur curiæ hic quod prædictus Ricardus Edge non est culpabilis de transgressionem et ejectionem prædictis, tunc iidem juratores prædicti dicunt, super sacramentum suum prædictum, quod prædictus Ricardus Edge non est culpabilis de transgressionem et ejectionem prædictis, prout prædictus Ricardus Edge interius pro se placitando inde allegavit. Et quia justiciarii hic se advisare volunt de et super præmissis, priusquam judicium inde reddunt, dies datus est tam prædicto Johanni Scattergood quam prædicto Ricardo Edge, hic, usque in octabis Sancti Hilarii, de audiendo inde judicio suo, eo quod iidem justiciarii hic inde nondum, &c. Ad quem diem hic veniunt tam prædictus Johannes Scattergood quam prædictus Ricardus Edge, per attornatos suos prædictos: Et quia justiciarii hic ulterius se advisare volunt, de et super præmissis, priusquam judicium inde reddunt, dies ulterius datus est tam prædicto Johanni Scattergood quam prædicto Ricardo Edge, hic, usque à die Paschæ in quindecim dies, de audiendo inde judicio suo, eo quod iidem justiciarii hic inde nondum, &c. Ad quem diem veniunt hic tam prædictus Johannes quam prædictus Ricardus, per attornatos suos prædictos; et super hoc, visis præmissis, et per justiciarios hic plenius intellectis, consideratum est quod prædictus Johannes nihil capiat per breve suum prædictum; sed sit in misericordiâ pro falso clamore suo; et prædictus Ricardus eat inde sine die, &c. Consideratum est etiam, quod prædictus Ricardus recuperet versus prædictum Johannem damna sua, occasione præmissorum, ad sexaginta libras, per discretionem justiciariorum hic eidem Ricardo, ad requisitionem suam, pro missis et custagiis suis, per ipsum in hac parte sustensis, juxta formam statuti, &c. inde editi et provis, per curiam hic adjudicata, &c.

Signatum
vicesimo Fe-
bruarii anno
duodecimo
Willielmi
tertii regis.

Blencow Just. having stated the case as in the margin, proceeded thus:

I conceive that the matter, we are to inquire into, is not the intent of the testator; for it appears plainly how the testator designed his land should go, that is, 1st. To the trustees for eleven years; then to the first and other sons of *George Jaques*, &c. as it is expressly disposed of by the will: But our business is to consider, whether his intent agrees with the rules of law. And, since all these devises cannot consist together, we must consider which of them are good, and which of them are not.

First, It is plain the devise to the trustees for eleven years is good: And it is as plain, that the devise to *Peter Edge*, after the

The several arguments of the judges of the Common Pleas, on their resolution of this case.

several estates tail, cannot now come in dispute; because it is found that *Richard Conway* had a son, who will exclude *Peter Edge*. Then, the only question is, upon the two remaining devises; 1st, To the first and other sons of *George Jaques* in tail male; and 2dly, Upon the devise to the first and other sons of *Richard Conway* in tail male: Whether both these devises, or either and which of them, is good? And I am of opinion, that the first of these is good; and the second is void: And therefore that judgment ought to be given for the plaintiff.

First, we must consider these devises as if *George Jaques* had really had a son born after the devise, and he were here present before us, and we were to say, whether he had a title to the lands or no; for it is a constant rule in all these cases, that we must consider, not only what *does* happen, but what *may* happen. 1 Co. 84. a. *Corbett's case*.

Tamen quare; for it seems to be settled, that a limitation over is good, provided it is to take effect within the compass of a life or lives in being, and 21 years afterwards.

To make this out, I shall instance only in the common case of the limitation of a term for years; which is subject to the same rules with that of an executory devise. When a term is limited to one for life, and afterwards to another for life, &c. that is good: But if there be any limitations, that are not within the compass of a life in being, these are void; as if there be a limitation to *A.* for life, and afterwards to the issue of his body, and afterwards to a third person *in esse*, the last limitation is void, whether *A.* had issue of his body or no.

Taking it then that we must consider this case, as if *George Jaques* had now a son; the next thing is, whether those two devises can stand together; and I am of opinion they cannot: But that if the first be good, the second is void. This depends upon the rule laid down in all executory devises, limitations of terms, and trusts of terms, that if by possibility they may continue many generations, as if an estate be limited to take effect upon failure of issue, that is void, both in case of a limitation of a term (a) and an executory devise. So is *Child and Bayly's case*, 1 Ro.

(a) In the case of a term for years, it is in general true, that a limitation over upon an indefinite failure of issue, is too remote and void. But the court of Chancery has very much inclined to adopt, in construction, the genuine and grammatical sense of the words "*dying without issue*;" which certainly mean, (though the construction having been hitherto, will remain different, where there is nothing in the context to warrant a departure from precedent) a failure of issue *at the death* of the person, whose issue (if any) were intended to take: For "*dying without issue*" can never, in grammar or sense, intend a failure of issue twenty years or a century after the death. As therefore a limitation over, which is to take effect within the compass of a life or lives in being and 21 years after, is good; the court has embraced distinctions extremely nice, and in fact merely verbal, to narrow the generality of the term, "*dying without issue*;" and, in order to serve the testator's intention, to confine it to dying without issue, living at the time of the death of the person from whom such issue are to spring; or a failure of issue within some period allowed by law, as within the life of some other person. Of the former class are those cases, where the court has said, that if the words are "*dying, leaving no issue*;" or if they are "*if he shall die without issue, then after his decease*,"

1 Ro. Abr. 612, 13. *Cotton and Heath's case*, *ibid.* *Pell and Brown's case*, in 2 Cro. and the printed case of the Duke of Norfolk. And it is all one, whether the person, to whom it is first limited, have issue or not, for we are to consider accidents; and no recompence can extend to it. The reason why such a remote contingency will not be suffered is, because the precedent estate is fettered and clogged with it, so that it cannot be aliened; for no recovery can bar it, according to *Pell and Brown's case*.

The only question that remains is, whether this first devise to the first son of *George Jaques* be a good devise or no? It is that which must turn the case, one way or the other. I must admit, that if this appears to be a present devise, it is void; because there was no person *in esse* to take; and then indeed the second devise would be good. But I take it, that the deviser did not mean it for a present devise; but meant it to take effect *in futuro*, as an executory devise. It is plain, the deviser did not intend he should take, in point of possession, immediately; because he had limited a term of eleven years before: Nor can it be supposed, but that he who made the will, and disposed of an estate to the first son of *George Jaques*, must know whether *George Jaques* had a son or not. By the words, he seems to have known that he had not; because he devises it to his first son: Whereas, if *George Jaques* had had a son, he could have given it to him, by express name. He does, indeed, devise to the first son of *Richard Conway*, in the same words, tho' *Richard Conway* had then a son: But the reason of it may be, because he intended that to take effect in future, as he did the first, and by way of executory devise; as if he should have devised it to the first son, if there should be any, at the time when the devise should take effect. To this purpose I compare this devise to the first son, to that in *Bate and Amberst's case*, *T. Raym.* 82. where the devise was, to one of the daughters of *A.* that should marry with a *Norton* within 15 years; which the judges expounded to be, to that daughter who should first marry with a *Norton*.

Taking it then that the deviser meant tutely, when he devised to the first son of *George Jaques*; this brings me to the last

"decease," [Vide *Penbury and Elkins*, 1 P. Wms.] the limitations over are good; for the words "leaving," and "then after his decease," shew that the testator meant to limit over, upon a failure of issue at the death of the first taker, and not upon a general indefinite failure of issue. Of the other class are those limitations, where the issue of the first taker is to fail in the life-time of the next taker, or of a third person not in the succession; as where there is a limitation after a dying without issue, to a person for life, there the limitation over is good; for if it ever take effect, it must take effect in the life-time of that person: So where (as in the case of *Kelly and Fowler*) after a dying without issue, personal estate was to be distributed by the testator's executors, the limitation was allowed; because, as the House of Lords held, the distribution being to be made by the executors, the *dying without issue*, must mean a failure of issue in the life-time of some of the executors. These cases shew an extreme anxiety in the court, to narrow the construction, in order to support such limitations over.

pro-

proposition, that this devise to the first son, who was not born at that time, was a good devise. It will be hard to put any difference between a limitation of a term for years, or the trust of a term for years (which is all one), and an executory devise: Now that a term may be limited to the first son of a person *in esse*, there is the case of *Cotton and Heath*, 1 Ro. Abr. 612. where one, possessed of a term for years, devised it to his wife for eighteen years, and afterwards to C. for life, and afterwards to the eldest issue male of C.; this was held a good devise, tho' C. had no issue male at the time of the devise, or death of the devisor: And tho' that case be not reported in any other book, yet it was cited by my lord chief justice *Holt*, in the duke of *Norfolk's* case; and never denied by any one to be law. If that be so, it will be hard to make a difference between that case and this: The same rule of construction will prevail in both, which is, that if either of them may, by possibility, introduce a perpetuity, they are void; but otherwise not. Therefore this case is an authority in point. Another case, which I rely upon, is that of *Blandford v. Blandford*, 1 Ro. Rep. 219. 2 Cro. 394. That case is likewise a devise of a term for life, and afterwards to A. and B; if they have no sons, equally and jointly together; but, if it shall please God to bestow on them both men children, then to those men children; or to one of them, if they have not both men children: The wife died, and A. and B. at the time of her death, had no issue male; but, three years afterwards, one of them had a son: And it was resolved by *Coke*, *Dodderidge* and *Houghton*, that the son born should have the land. There it was to a person not *in esse*, till three years after the death of the wife; and yet his title was adjudged good: And this agrees with the case of *Cotton and Heath*. Another case, that I shall rely upon, is the case of *Bate and Amberst*, T. Raym. 82. That case is of a devise, and an executory devise, (as this is): The words were, "I give my land to one of the daughters of A. that shall marry with a Norton within fifteen years"; A. had three daughters, and one of them did marry with a Norton within fifteen years; and it was adjudged a good executory devise. This was as remote a contingency, as that in our case; the land must necessarily descend to the heir, in the mean time, till the marriage happened; there is a longer time to expect, whether the contingency will happen; and I observe, that in that case it is not found, whether A. had a daughter in the life-time of the devisor or no; but it is plain they were not married; and when or which of them would be, was not known. I can make no difference between the cases: Here the contingency must of necessity happen within the compass of the life of *George Jaques*, or within forty weeks after; for it shall not be intended that *George Jaques's* wife will die, and he will take another wife, tho'

tho' even then it would be within the compass of lives *in esse*; For in that case there were 15 years, which may possibly be longer than one life.

This is a case of very great difficulty. It is hard indeed to disinherit the heir at law; as he would have been, had there been a son to take by this devise: but it is plain, that the devisor intended his heir at law should never have his land. For these reasons, I think judgment ought to be given for the plaintiff.

Powell Justice. The case has been stated, and the question is upon the two devises; First, to the first and other sons of *George Jaques*, and afterwards, upon failure of issue in them, or upon their laying aside the name of *Edge*, to the first and other sons of *Richard Conway*.

It is plain these devises cannot take effect by way of remainder; because there is no freehold, in the particular estate, to support them: But if they are good, it must be by way of executory devise. I shall therefore consider, *First*, whether this devise, to the first son of *Richard Conway*, be good by way of executory devise, after the former: *Secondly*, whether the first devise be good or void; for if his intent be not good, and agreeable to the rules of law, it is void: *Thirdly*, whether, if the first devise be void, the defendant shall take by way of remainder. I agree, we must consider this case, as if *George Jaques* had a son, and he were here, and stood on one side of the court, and the defendant on the other. I agree too, that where the testator's intent is contrary to law, the devise is void. But it is our duty to make the testator's intent and the law agree, as well as we can.

As to the first point, whether this devise be good, to *Richard Conway*, after a devise of an estate tail to the first son of *George Jaques*, determinable upon his laying aside the name of *Edge*; I hold it cannot be good by way of executory devise.

There are two sorts of executory devises, as to inheritances; one sort is, where the devisor parts with the whole inheritance, and devises it over to another upon a contingency, and turns the absolute fee, which he had devised before, into a base and qualified fee, and so limits one fee upon another. The other sort is, where the devisor does not part with the fee out of himself, but devises it *futurely* to rise upon some contingency, and leaves the inheritance to descend in the mean time. The first of these sorts of executory devises was wholly unknown at the common law, and very repugnant to the rules of it. Lord *Coke* in his *1 Inst.* 18. says, that two fee simples cannot depend one upon the other: There can be no such thing. It may happen indeed, by act in law, since the statutes for forfeiting estates for treason, and since the statutes for fines barring estates tail; but it cannot be so limited by the act of the party. *Vaughan* indeed in *Gardiner and Sheldon's case*, (*fo.* 269.) seems displeased with

my Lord *Coke* (*ubi supra*) for saying that if land be given to *A.* and his heirs, so long as *B.* has heirs of his body, a remainder over is void; and says that he takes the law to be otherwise, and that my Lord *Coke* cites no authority to ground his opinion upon. But I wonder more at my Lord *Vaughan*; for he complains of my Lord *Coke* for not citing authorities, and cites none himself. Indeed, there are no authorities either way; some things are so clear, that they need no authorities to maintain them. It was after the statute of wills, that these executory devises crept in: In 28 H. 8. (*Dy.* 33.) there is the opinion of *Baldwine* and *Fitzberbert*, (who were the greatest lawyers of that age) that a fee upon a fee, even in a will, was not to be endured. 19 H. 8. 8. *Acc.* The first case of this kind of executory devises, was the case of *Wellock* and *Hamond*, 32 *Eliz.* 3 *Co.* 20. 3 *Cro.* 204. 2 *Leon* 114. The case was thus. A copyholder in Borough English surrendered to the use of his will; and devised his land to his eldest son, paying to his younger children so much within two years: The eldest son did not pay the legacy within two years; and it was adjudged, that the word (paying) was a limitation, and that the eldest son's estate ceased immediately upon default of payment, and that it should be transferred over to the younger son, according to the custom of Borough English. This was a new case, and a strain in favour of the younger children. After this case had broke the ice, they attempted the like again, but not with the same success; and that was in 37 *Eliz.* in *Sorill* and *Gerard's* case, 3 *Cro.* 525. *Mo.* 422. where a devise was to one and his heirs, and if he died without issue then to another: This limitation over to the other, upon failure of issue or within age, was held void, and that the devisee had an estate tail by virtue of the words, 'and if he die without issue;' and the other words 'or within age', were held void: And there they held that a remainder could not be limited upon a fee, in a will. The next case is that of *Clere* and *Peacock*, 3 *Cro.* 359. 2 *And.* 22, there it was held again, that after the fee was once disposed of, in a will, no limitation afterwards is good. The next case is *Bacon* and *Hill*, *Mo.* 464. 3 *Cro.* 497. and the next to that is *Pell* and *Brown*, where these executory devises got some firm root. Indeed in *Hanbury* and *Cockell's* case, 1 *Ro. Abr.* 835, 6. *Sty.* 274. and *Jay* and *Jay's* case, *Sty.* *ibid.* they were questioned, and even then they went down with the Judges like chopt hay; but now they are not to be questioned, for there are so many estates settled, that depend upon them, that it would be dangerous to overthrow them.

Our devise is not of the first sort; but it is of the second sort; that is, where the devisor does not part with the fee out of himself, but devises it futurely to rise out of some contingency, and leaves the inheritance to descend in the mean time. This is not disagreeable to the common law; for if a man, at the common law,

law, devised that his executors should sell his land, and they sold it accordingly, the vendee is *in* by the will: And that was an executory devise, though it was not called so, for that was no more than a devise to such person as the executor should name; and he was so far *in* by the devisor, that, if he had occasion to plead it, he must not say, that the testator devised that the executor should sell, and that the executor did sell it to him accordingly; but he must plead, (as the law says) that the testator devised it to him: Nay he is so far *in* by the will, that, if the devisor die without heir, and the land escheats to the King, yet the vendee of the executor shall devert the estate out of the King, without petition or *monstrans de droit*; and that is *Goodechapp's case*, 4 E. 3. 16. But besides this instance, of a man's devising that his executor shall sell his land, I do not find any other case of an executory devise, till of late years. The first I find is *Hind and Lyon's case*, 2 Leon 11. 3 Leon 64. 70. There the devise was *in effect* to the wife, till the son should attain the age of 24, and then the remainder over to another. The next is the case of *Haynsworth and Pretty*, 3 Cro. 833. 919. Mo. 644. That was a devise to the eldest son, upon condition that he should pay such a sum to his younger brothers; and if he did not pay it, then they should have the land; he did not pay it, and it was adjudged that they had a good title. The next case is *Purflow and Parker*, 2 Ro. Abr. 793. of the same nature with the last; the next is that of *Bute and Amberst*, T. Raym. 82; and the next is the case of *Woodly and Nightingale*, Hil. 13 & 14 Car. 2. Rot. 1347. 2 Keb. 296. 300. a devise to a daughter, and, if she die without issue before 21, then to *J*; and it was adjudged a good executory devise to *J*.

The cases of devising terms for years were of late commencement: There is a difference taken in *Plow. in Welken* and *Es-kington*, and *Paramour v. Yardley*, between a term and the use and profits of a term, but they were not settled till *Matthew Manning's case*, 8 Jac. 8 Co. 95^b. *Walmsley*, who was a very great lawyer, opposed the resolution of that case; but the other justices were against him: And there it was settled, that a man might devise a term to one for life, remainder to another for life, and it was good by way of executory devise.

I have given this history of executory devises, that we may the better know how to treat them. The Judges were always very cautious how far they extended them; and we must take care that they do not tend to a perpetuity. The resolution in *Pell* and *Brown's case* was very true, that they cannot be barred by a common recovery; and therefore there must be a strict guard put upon them. My brother *Darnell* indeed, when he argued this case, said that it could be no perpetuity, so long as all the persons were *in esse*, who might join; and that only is an absolute perpetuity which cannot be barred: but the question is, whether

This guard however has been since removed, and the rule extended, so as to comprehend a life or lives in being, and 21 years afterwards.

it be in the power of *one* person, who has the estate in possession, which may by possibility continue for ever? whether *he* can do it? So the stat. *de donis conditionalibus* had introduced a perpetuity, and for that reason the Judges gave countenance to common recoveries; and yet there he in remainder was in being to join: But the inconvenience was, that tenant in tail could not do it alone. Now in our case, if the devise to the first son of *George Jaques* were good, he would have an estate tail, subject to his continuing the name of *Edge*, and upon failure of issue or refusal to continue that name, then to the first son of *Richard Conway* in tail male. Now this estate tail, to *Richard Conway*, could never be barred by the first son of *George Jaques*; because it is by way of executory devise, and therefore it is such a remote possibility as would make a perpetuity. The guard then, to be put upon these contingencies, is, that they exceed not a life or lives in being all at once: The candles must be all lighted at once. If we go once beyond that, I do not know where we shall end: And I do not know any opinion against this rule, but that of *Vaughan* in *Gardiner* and *Sheldon's* case. In 4 *Leon.* indeed, fo. 238. there is an opinion *obiter* of my Lord *Coke's*, but I suppose he lived to be of another opinion.

Vide 2 Blac. Com. 174.

Seeing then that this second devise, *viz.* to the first son of *Richard Conway*, is not good, if the former be good; the next thing to be considered, is

Whether this first devise, *viz.* to *George Jaques*, be good.

I shall consider this point under two heads; 1st, Whether a devise to the first son of a person, who has no son at that time, be a good devise; And 2dly, I shall consider it, in regard to the term for years, whether the precedent term for years will help it. As to the 1st, taking the devise without the term for years, I am of opinion it is not good. This question has not been resolved, that I know of. The case most like it is that of an infant *in ventre sa mere*, and there indeed the devise is to a person not *in esse*; yet that does not come up to this case: But let us examine how the law stands, as to the case of an infant *in ventre sa mere*; for it was never adjudged: Opinions there have been, concerning it; but never any judgment given. The book of 11 H. 6. fo. 13. is the first place where we meet with that case put; and there *Babington* is of opinion that it is good, and *Pafton* that it is not good: The same case is in *Bro. (Devise)* 32. In 7 Co. fo. 99. the first case is cited, but no judgment given; and the same is in 1 Ro. Abr. 609, 610, and there it is mentioned with a *dubatur*. In Dy. 303, 4. there is a devise of land to the child, that the wife was then going with, if it were a son; and there it was held void, though there are future words: That

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is a strong case indeed; but I take it not to be law, as I shall have occasion to mention by and by. In *Dy.* 342. such a case is mentioned, but no opinion given in it; and so in *Mo.* 127; but afterwards *fo.* 177. it was held good, and is there said to be so adjudged: *There* the case was, that a man devised land to two persons, and the child that such a woman was enscint with, and they held the devise good; but *Dyer* doubted, whether the child should take as joint-tenant or tenant in common. Afterwards, in *Mo.* 637. it is held void; and so in 3 *Cro.* 423. *Fuller* and *Fuller's* case, unless there be a new publication, after the birth of the child. In 2 *Bull.* 272. it is held to be void; and so is 1 *Ro. Rep.* 110, and *Litt. Rep.* 255. So the law stood till *Charles* the 2d's time, when in *Snow* and *Cutler's* case, 1 *Sid.* 153. *T. Raym.* 162. the court was divided; *Moreton* and *Wyndham* held it void, *Keeling* and *Twisden* thought it was good. Indeed, in 2 *Mod.* 9. *Nurse* and *Yarworth's* case, *Ld chan. Finch* takes notice of *Snow* and *Cutler's* case, how the court was divided; and he seems to be of opinion that it was good; and afterwards, in *Bate* and *Amberst's* case, *Bridgman* held it to be good. I am of opinion that a devise to an infant *in ventre sa mere* is good; and my reason is, that it appears plainly that the devisor intends futurely, when he takes notice that the child is not yet born; and therefore it shall not be taken to be a present devise. But that case, of an infant *in ventre sa mere*, differs from the case in question; for *here* no body can tell, whether the testator knew that *George Jaques* had a son or not: It can't be collected, out of the words, that he knew him not to be in being; and if so, it will be a present devise to a person not *in esse*, and consequently void. The objection to this is, that the estate descends, in the mean time; and it will be good to him when he is born: But *non constat* whether he did not mean a present devise. And, admitting the argument, if we should carry it so far, as to say that a devise to the right heirs of *J. S.* is good, it might be said, in that case too, that there would be an heir for the land to descend to in the mean time, that is, till after the death of *J. S.* But that case, of a devise to the right heirs of *J. S.* has been often agreed to be ill, as in *Snow* and *Cutler's* case; and yet there is as much reason to maintain it, as our case of a devise to the first son: One indeed is more a description of the person, but *right heir* is a name of purchase too. Therefore, a devise to the first son cannot be good, but by future words, as if he had said in case *George Jaques* have a son; and even then it would not be good to a posthumous son, because that extends beyond the compass of one life: But where it is devised directly to the son, it cannot be intended, but that the devisor intended it to be a present devise; and that it should never descend to the heir. My brother *Blen-cow* says, that the devisor cannot be intended but to know and take notice, whether *George Jaques* had a son, to whom he had

devised his estate: I can't tell that; *George Jaques*, it seems, had no son, and *Richard Conway* had a son, and yet he uses the same words in the description of both; he might as well think the one had a son as the other: It is possible, that the devisor might think *George Jaques* had a son beyond sea, and therefore might intend it as a present devise; tho' it could not be, because it happened that there was no such person to take.

The great doubt with me, is in respect of the term of 11 years, preceding this devise to the first son. It cannot be a remainder; because the term for years is not sufficient to support it; but my doubt is, whether it be not a good estate after the 11 years, like the case of *Cotton and Heath*; and whether it shall not be intended, that the devisor intended a future devise, because he has disposed of the land for 11 years before it should take effect, which he might judge a reasonable time to discover, whether *George Jaques* would have a son or not: For tho' it were doubtful whether a present devise to an infant *in ventre sa mere* were good, yet such a remainder was always held good. *Simpson and Southern's case*, 2 *Bullst.* 272. If I should take it to be like a remainder, I should take it to be like a future devise. I must confess I was once of opinion, that this devise, to the first son of *George Jaques*, was good; and that to *Richard Conway* ill: But upon great consideration I have changed my mind.

As for the notion which some people have fallen into, that a devise to an infant *in ventre sa mere*, or any such future devise, is not good; because (say they) the stat. of wills says that it shall be lawful for people to devise their land to any *person or persons*, and a child not yet born is not a *person*; that notion is upon a wrong foundation; for there is not one word of "*person or persons*" in the stat. of wills; tho' my *Ld. chan. Finch* lay under this mistake. 2 *Mod.* 9. That which led people into this mistake was, because the stat. of *uses* says, they may be to any *person or persons*; and therefore it was rightly adjudged, in the *Earl of Bedford's case*, that a person not *in esse* cannot take by a springing use; but the stat. of *Wills* mentions no such thing.

I shall now mention the authorities that staggered me in my opinion, and shall answer them. The first is that of *Bate and Amberst*; (there is a hint of it in *T. Raym.* 82.) a devise to one of the daughters of *A.* that shall marry with a *Norton*, within 15 years: And that was adjudged to be good, because it must be taken futurely, since the contingency was to happen within 15 years. The next is *Nurse and Yarworth's case*, 2 *Mod.* 9. Then there is *Taylor and Biddell's case*, 2 *Mod.* 292. a devise to *A.* for 21 years, remainder to the right heirs of *J. S.*; and that was held a good executory devise. Then there is an authority not in print: It is in a manuscript report of Mr. Justice *Rhodes*, where a devise was for years, the remainder to the right heirs; and in that case *Popham* held it good, in case *J. S.* die during the

the term, and there shall go an estate to the heir in the mean time, by implication. The next is *Cotton and Heath's* case, 1 *Ro. Abr.* 612, 13. a devise to the wife for 18 years, and afterwards to *A.* the eldest son for life, and afterwards to the eldest issue male of *A.*; and that was held good, which must certainly be by reason of the precedent estate for years. But our case is not like any of these.

As to the case of *Bate and Amberst*, (and indeed all the other cases) the intent of the deviser appears to be, that he meant futuramente. The word (*remainder*) and the word (*afterwards*) both imply a futurity: But, in our case, the deviser devises his land, to *Serj. Bigland* and others for 11 years; then he begins in a new clause, "*ITEM, I give the manors of, &c. to the first son of George Jaques.*" Therefore the question is, whether he did not intend to give the immediate freehold to the first son of *G. J.* so that it should immediately go to him; as if he had first devised the term for 11 years, and afterwards in a new clause had said "*The freehold of my estate I give to the first son of George Jaques.*" The devise to *G. J.* is not at all with reference and respect to the term for years; if he had intended it so, he would have said "*if George Jaques should have a son during the 11 years;*" but as it is now, it is like an original devise, and it does not appear but that he intended it to go so immediately. To the authority of *Nurse* and *Yarworth*, I oppose the case of *Goodright and Cornish*, where that point was adjudged directly contrary. For the other authority, of *Cotton and Heath's* case, I do not find it mentioned any where but in the abridgment; I confess it is a strong case, but I would answer it with another, adjudged since, and that is *Sir Henry Goring's* case, (*Hil. 13 & 14 Car. 2.*) in *Canc'*, upon a reference to the *Ch. Just. of B. R.* and the case was thus; *Alford* was possessed of a term for years, and devised it to his son for life, and then to his wife for life, and then to the heirs males of the body of the son; and whether it should go to the heirs males of the body of the son, or not, was the question: And it was held, that it should not, for that the limitation was void. [So it was adjudged, in *Sir John Aubrey's* case, in the Exchequer.] And *Bridgman* then puts the case of *Cotton and Heath*, according to the rule in *Matthew Manning's* case; that is, that a devise to the last person in the will shall be taken to be the first devise, and the rest to others in the mean time; according to which rule, the case of *Cotton and Heath* will not hold; for there the last devise is to a person not *in esse*, and consequently cannot be taken to be the first devise: but in case of a trust for a term, *Bridgman* then held it might be otherwise, to which opinion *Hale* accorded. Now that case of *Cotton and Heath* is of a trust, which chancery perhaps will extend beyond what the common law will in estates: That is a chancery case, wherein many circumstances may alter the resolution, that do not appear

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pear to us. In *Snow* and *Cutler's* case, the court was divided on that very point; two of the Judges held it was good, and two that it was void: But in this case there are no future words, not so much as that it shall remain to the first son, &c. Indeed, in respect to the possession of the land, it is future, but in respect of the freehold, it is a present devise: And *Wild's* case, (6 Co. 16.) is an authority, that where the deviser intends the devisee shall take presently, his will shall not be so construed as to make the devisee take futurely; and so it was said in *Skelton* and *Bide's* case, 2 Keb. 300. where the devise was to the children of *A. procreatis et procreandis*, and by virtue of the word *procreatis* it was held a good future devise, but if that word had been out, it would have been a present devise. Vi. 3 Cro. 334. *Frederick's* case.

If the devise, in our case, had been to *B.* for 11 years, remainder to the first son of *G. J.* in fee, I should have been very much inclined that it had been a good devise; but then I should have construed it as an executory devise, and as tho' it had been, "*If George Jaques have a son during the 11 years:*" For so was *Bate* and *Amberst's* case, "*To one of them that shall marry, &c. within 15 years*", which are future words: and as to what my brother *Blencow* says, that it is not found in that case whether there were any daughters, at the time of the devise, it cannot but be intended that there were; otherwise he would never have treated for the marriage of one of them with a *Norton*. If our devise had been to the first son of *George Jaques* "*to be begotten*" it would have been good; any thing of future words would have made the first son of *George Jaques* to have taken, provided he had been born in the life-time of his father, but not a posthumous son. Qu.

My opinion being thus, that the first devise, taking it with and without the term, is bad, the next thing is, whether he is in by way of remainder. My brother *Lutwyche* insisted, that there is a condition precedent to be performed, before ever it can come to the defendant; namely, that if the first and other sons of *George Jaques* refuse to be called by the name of *Edge*, or die without issue, that then it should come to the defendant: Now *George Jaques* never having any son, that condition was impossible. And for this he cited *Plow.* 271. *Fuller's* case, and 1 *Inst.* 216, 218. My answer is, that it is not a condition precedent: It is part of the limitation of a former estate, which is void; and if the estate is void, all the limitations which depend upon it will be likewise void. But indeed if the conditional words had stood by themselves, without any estate to which they were joined, then nothing could have accrued to the defendant, without performance of the condition first; like to the case, where lands are devised to a monk for life, and after his decease to another, there the other shall take presently; because the estate given to the monk is void, and therefore those words (and after

after his decease) shall not make a precedent condition, for the other's estate to commence upon: But if an estate be devised to one after the death of the monk, there the devisee shall take nothing till the monk's death; because the condition stands by itself, without depending on a void estate. 9 H. 6. 24. 37 H. 6. 17. And for an authority that where an estate is void, all the limitations and conditions that depend thereon are void; there is the *Ld. Paget's case*, 1 Co. 154. *Mo.* 193. 1 *And.* 259. 263. The case in short was thus: The *Ld. Paget* covenanted to stand seised to certain uses for 24 years, and afterwards to the use of his son in tail: It happened that the term for years was void, and the question was, whether the son should take presently, or stay till the 24 years were expired; and adjudged he should take immediately, for the estate for 24 years being void, the words (and afterwards) shall not be a condition, for the son's estate to commence upon. There is another authority, 7 E. 3. 19. *A.* So, upon a feoffment to the use of *A.* for life, remainder to *B.* in fee, if *A.* refuse, *B.* shall take immediately. 1 *Inst.* 22.

seised in fee makes a gift in tail to *B.* and for default of issue to himself for life, and after the decease of himself to *C.* in fee; the remainder to himself for life was bad, and it was held that *C.* should take immediately after the expiration of the estate tail. 3 *Cro.* 422. (*Fuller and Fuller*) is a direct case in point. So here, since the estate limited to the first son of *George Jaques* is a void estate, the condition annexed to it will be likewise void; and then the defendant has a good title by way of remainder, and I think judgment ought to be given for him.

N. vill Just. agreed with *Powell*, that the first devise to the first son of *George Jaques* was void, because it was intended as a present devise, and there was no person *in esse* to take; and therefore, that estate being void, it will be a good remainder to the defendant, and judgment ought to be given for him.

Treby Ch. J. I am of opinion that judgment ought to be given for the defendant. I acknowledge that this a case of very great difficulty; and indeed all cases of perpetuities and executory devises are generally perplexed: They are so far from the simplicity of the common law, that I do not wonder that questions daily arise upon them; as my *Ld. Coke* observes, concerning *uses*, that they had tortured the wits of men. In this case of ours, the defendant can have no title, unless the devise to the first son of *George Jaques* be void; for if that be good, it would be a perpetuity to let in the defendant, after that estate determined. This case must be considered indeed, as if *George Jaques* had had a son, and he were before us. I say then, that if *George Jaques* had had a son, born after the devise, he could not take by way of present devise, because not *in esse* at the time of the devise; nor by way of remainder, because there is no sufficient estate to support a remainder; nor by executory devise, because he intended a present devise.

I shall consider this case two manner of ways ; 1st, Whether the devisor intended the first son of *George Jaques* should take by way of present devise. 2dly, If he did not intend he should take so, but by way of executory devise, then whether the contingency of *G. J.* having a son be not too remote, and consequently the devise void. If that be void either of these ways, then the defendant will be let in ; for then it will be no more than tenant for years, the remainder over to the defendant.

I do not lay much weight upon the term for 11 years, which has been insisted on, as being thought by the testator to be a reasonable time for a son to be born in. I agree that if the devisor had devised his lands to one, 11 years after his death, it would have been good ; but here the words import a present devise, and if so, we ought not to construe it an executory devise, contrary to the intent of the testator. 2 *Mod.* 292. I agree the heir is the favourite of the law ; but it is plain he was not the testator's favourite, for he plainly endeavours to keep him out ; and therefore the favour, which the law generally shews the heir, can have no place here.

It has been generally taken, that where a man intends a present devise, it shall work so or be void ; and therefore a devise to the right heirs, of *J. S.* is void ; and in *Snow* and *Cutler's* case it was so agreed, that if the devisor intended a present devise, if there were no person *in esse* to take, it is void, and shall not be construed otherwise. My brother *Powell* has cited several cases to this purpose, and particularly that *vexata questio* of an infant *in ventre sa mere*, upon which the court were divided in *Snow* and *Cutler's* case : Truly I can't think a devise to an infant *in ventre sa mere* to be void ; and all the Judges, that I have heard speak of it, have said that it would be a great inconvenience to set it aside, there are so many estates that depend upon it : If a man devise land thus ; viz. " *If my wife be delivered of a son, I devise my land to him,*" then it would be good without question ; and I think a devise, to the child that his wife goes of, is all one. I agree to what my brother *Powell* says, that a devise to the heirs of *J. S.* is void, if *J. S.* be living ; but suppose a man devises, that if *J. S.* die, his heir shall have such lands ; or should, discover his knowing that *J. S.* were alive by any way ; I will not determine whether that might be good or no : Possibly much might be said to maintain it ; and it does not carry the contingency beyond the compass of a life, for as soon as *J. S.* dies, it will appear whether he has an heir or not.

But now to the matter of executory devises, there is but very little left for me to say : My brothers have mightily impoverished the argument, having cited most of the cases already ; but I think they have still left me one or two.

Executory

Executory devises were unknown to the ancient law: *Hind* and *Lyon's* case was the first. As to terms for years, they were settled in *Manning's* case; and as to fee simples, &c. they were settled in *Pell* and *Brown's* case, but still with a great deal of jealousy and caution, lest they should tend to perpetuities. A perpetuity is that condition of estate, that he who has the fee simple cannot alien it. As where land is devised to a man and his heirs, provided that if such contingency happen, it shall go to another and his heirs; in this case the devisee cannot alien, but the land will be fettered, till it appear whether the contingency happen, or not: This was odious to the common law, and the opposing them was one of the greatest policies that ever the common law discovered. The stat. *de donis* had introduced a perpetuity, and if it had stood, I believe there would not have been a foot of land to have been purchased at this day; whereas alienations of land are the greatest encouragements to trade that can be. We see *formedons* often brought, in our books, before the invention of common recoveries, so that all the land in *England* would have been amortised in a few hands: Besides, tenant in tail was not subject to waste, and since he could not alien, that would prove a great detriment to the kingdom.

Perpetuities (says Sir *Ed. Coke*) were born under some unfortunate constellation; for, in all the suits concerning them in *Westminster* hall, they never had any judgment given for them, tho' many have been given against them. 10 Rep. 42. b.

And as for executory devises, they were complained of, within a very few years after they were introduced; and those who introduced them lived to repent of it. Great inconveniencies were found by them, therefore it was necessary that a bound should be put to them, which was agreed to be thus, that they should be restrained within the compass of a life or lives *in being*; for as it has been said, if the candles be lighted all at once it will be well enough: But farther *than a life* by my consent it ought not to go. (*Vide* the case of *Lloyd v. Carew*.) I do not mean by this, but that if a contingency be restrained within a reasonable number of years, it may be good, as well as where it is restrained to a life; as within 10 years (according to the case in *Pop. 6.*) or possibly 20 years: I will not determine what number of years, but I say if it be restrained to a reasonable number of years it may be good; but not to be extended further than the instant of the expiration of a life: Possibly it may be good to the heir of a person, as I said before, because that happens at the instant of his death; but I would not go a week further.

But vide *supra*, in what manner they have been since extended.

In our case, if the devise had been to the first son of *George Jacques*, which he should have in his life time, or within 40 weeks after his death, I hold it would have been void: The words of our will import as much, and therefore it is void, as much as if it were expressed. I am not singular in my opinion in this point: First, there is the case of *Child and Bayly*, 2 *Cro.* 459. *Palm.* 335. 1 *Jo.* 15. The case in effect was thus; there was a devise of a term to *A.* and his assigns for life, and if he die with-

But see the
case of *Pin-*
bury and *E-*
kins.
1 P. Wms.
and the note
Ante 283.

out issue, living at the time of his decease, then to *B*; and it was argued, that this was no more than a limitation to *A*. for life, the remainder to *B*. for life: No, say the Judges, it shall not be extended so far as this, for first it is devised to *A*. and his assigns, which is a full disposition of the term, and then to limit to a person, after the death of another without issue, looks like a perpetuity: And they said they would not vary *a tittle from the compass of a life*. So too in *Ro. Abr.* 615. the Judges said they would not admit of a devise to exceed that in *Matthew Manning's* case, for the inconveniency they had seen in it; and *Croke*, in the report of *Child* and *Bay's* case, says that the Judges made an observation, upon that resolution in *Matthew Manning's* case, that if it were now to be disputed, it would be hard to maintain. To this purpose too are *1 Sid.* 47. *T. Raym.* 493. *3 Keb.* 123. 178. *Carter*, 77. 87. 88. and he cited the case of *Rhetorick* and *Chappell*.

If then the Judges were resolved to set a bound to these sort of devises, it was a recalling or correction of their error in admitting them at first; and therefore let the exceeding of this rule look as small as it will, it ought not to be permitted. This was also the opinion of *Hale*, in *Carpenter* and *Smith's* case, [there is a note of it in *3 Keb.* 123. 158.] which was the case of a springing use, but that is all one; a devise to this purpose is to be measured by the same rule, that is, they ought to be within a competent time; and the furthest extent of that is one or more lives *in being*; this is a common possibility, and further it ought not to be carried. That was the case of a posthumous son; but in our case it was not only an unborn son but an unbegotten son, and therefore not like the case of an infant *in ventre sa mere*. *Cart.* 87.

Now the devise in our case imports thus much, That if *George Jaques* lived never so long, and begot a son (tho' it were born after his decease) he should have the land; which he could not in case of a contingent remainder.

Contingencies, whereupon executory devises depend, are of two sorts; 1. Whether one shall come *in esse*, during the life of one already *in esse*; 2. Where a thing is to be performed, as payment of money or marriage, within such a time, &c. And both these sorts of contingencies must happen during the compass of a life. The objections against this are from cases. The first case is that of *Bate* and *Amberst*, which was a devise to one of the daughters of *A*. that shall marry a *Norton* within 15 years, and that was held good: As to my brother *Blencow's* objection, that it does not appear whether the daughters were *in esse* at the time of the devise, I answer it must necessarily be intended that they were; but however the marriage was to be within 15 years, which was a reasonable time. Then there is *Blandford* and *Blandford's* case: *Tho. Blandford*, being possessed of a term, devises it to *T.* and *L.* his two sons; if they have no sons, equally and jointly together; but if it please God to bestow
on

on them male children, (which words by the way import that he meant futurely, and that he knew that his sons then had none) then to those male children, or to one of them, if they have not both male children: The testator died, and the sons enter, having then no children; but three years after *T.* one of the sons had a son, and it was adjudged he should take immediately. Now this was no more than what we lately adjudged in *Loddington* and *Kime's* case, where a devise was to one for life, and if he have male issue to such issue, and if he had none then to another and his heirs: We construed that to be an estate for life in the devisee, and if he had issue male *during his life*, that issue should have the fee: But tho' he had a *posthumous son* he should not have it. As to the case of *Cotton* and *Heath*, I will not say there is a difference between a term for years and a fee simple, as to this purpose; but in chancery perhaps they go farther in trusts than we do in devises of terms, and they consider many circumstances in a case which we do not; but I do not find that case reported either by *Jones* or *Croke*, who are said to be two of the three Judges that resolved it: I believe they had no good opinion of it, otherwise they would have mentioned it: They have reported several other cases, that came out of chancery, and seldom missed any remarkable one, in their own time. The reason given for the resolution of it (the book says) was, because it was all one with *Matthew Manning's* case, which it is not; for a life and a *life in being* at the same time are not the same with a *life and 40 weeks* after, so that *that* is straining it with a wrong reason.

The cases don't differ in that point.

Since then the devise to the first son of *George Jaques* is void, then it lets in the title of the defendant, who is first son of *Richard Conway*. I don't wonder that my brother *Blencow* has differed from me; for I must own that as to this last point, which I am now going to speak to, I have differed from myself. But upon great consideration, I think that the limitation, annexed to the estate of the first son of *George Jaques*, is to be expounded in this manner: If he had limited an estate to the defendant barely upon condition, that the first son of *George Jaques* should die without issue, then indeed it would have been merely a condition: but here his meaning is, that if that estate of the first son of *George Jaques* failed, then it should go to the first son of *Richard Conway*; and what he intended a determination, the law has done for him in making the estate void: for when the law takes away the first devise, it will have the same effect as the act of God, by the death of the first son of *George Jaques* without issue, or the act of the party, in not continuing the name of *Edge*; and so the freehold vests immediately in the defendant. I shall give some instances, where one is incapable to take, who is intended to take immediately, there it shall go to the next that is capable, whether he be to take concurrently with, or in succession to, the other; as if lands are given to a man *et primogenito filio*, if he has no son,

he shall take the whole. 1 Co. 100, 101. And in 1 Leon. 195. there are several instances, where the person that is to take the particular estate not being capable, the remainder-man shall take presently; and there they put the case of an estate limited to a monk, or *Salisbury* plain, or *Paul's* steeple, in all which cases the remainder-man shall take, as if there had been no estate limited before: And in the case of a monk, it shall not be intended that he will *deveign*, &c. He also cited *Cart. 4. Bendl. 68. Periam* Just. indeed, has an odd remark, at the end of the case in *Leon.*; he says, that if a lease be made to commence after the determination of a former lease, when in truth there is no such one, that lease shall never commence; but that single opinion is confuted, and the contrary adjudged, about twenty years ago, in the case of *Foot v. Berkley*. So in *Mo. 482, 520. Holcroft's* case; where there was a devise to the first, second, third and fourth sons of *A.* and if the fourth son die without issue, then to *B.*; *A.* never had a fourth son, and yet the remainder good to *B.*; for tho' the limitation is not performed in words, yet in intent and substance it is. And for these reasons, I have delivered, I conclude judgment ought to be given for the defendant.

This case was afterwards removed, by writ of error, into *B. R.* and upon arguing it there, *Raymond* (*pro quer.*) cited *Davis, 34. Child and Bayly's* case. *Pell and Brown's* case. 11 H. 6. 13. *Bro. Devise 32. Mo. 177. per Mead and Periam. Dy. 302. Mo. 637. 1 Ro. Rep. 234. 1 Sid. 153. Noy 43. Blandford and Blandford. Cotton and Heath. 1 Mod. 104. Burges and Burges. Bate and Amberst. Massingberd v. Ash, 2 Chan' 275. Lloyd v. Carew, 2 Keb. 300. Skelton v. Bide.*

Lutwyche (*pro def.*) argued, 1. That the devise, to the first son of *George Jaques*, was void in its original creation; and consequently, 2. That the devise to the first son of *Richard Conway*, who is the defendant, is good; and that by way of remainder.

The first point, he said, he would endeavour to make out two ways; 1. As a present devise to the first son of *George Jaques*, who never had any son, and is consequently a devise to a person not *in esse*. 2. Admitting it should be taken as a future executory devise, yet it will be void; because the contingency is too remote, not being restrained within the compass of a life or lives in being. And first, he insisted that the term for eleven years had no relation to this devise; which he the rather insisted on, because it is that which distinguishes this case from most that had been cited on the other side. If it had been, first to the trustees for eleven years, remainder to the first son of *George Jaques*, or afterwards to the first son of *George Jaques*, or any thing of future words, there it might probably have been construed a future devise; but here he devises the term, and then (in a new clause) makes the devise,

devise, which is an original devise, and seems industriously separated from the term, on purpose to shew that he intended the first son of *George Jaques* should take the freehold immediately. There is no light to induce the court to believe the devisor knew *George Jaques* had no son; for that and the other devise to the defendant are in the same words: Then the question is barely this; one seised in fee, devises all his lands to the first son of the body of *George Jaques*, who has no son at that time; whether this is a present, and consequently a void devise, for want of a person capable to take; or whether it shall be taken as a future and executory devise, and so good to any son *George Jaques* should afterwards have. But he held it a present devise, and as void as if it had been to *G. J.* and no such person had been in *rerum natura*. The law indeed favours the intent of wills, but then it must be manifest and certain, not obscure and doubtful; otherwise they must be construed as grants are. 6 Co. 16. (*Wyld's case*) resolved expressly; and the same rule is laid down in 3 Cro. 743. And for that reason, *Wyndham* says, in *Snow and Cutler's case*, 2 Keb. 298. that he will never construe a present devise to be a contingent one; because it is to work an estate by construction into what is abhorred. Also it appears, by the condition annexed to the estate, that it was the devisor's intent to perpetuate and continue his own name from the time of his death: The words are, "That the first and other sons of *George Jaques*, and the heirs males of their bodies, to whom the premises, by virtue of the devise aforesaid, should remain and come, shall and do take upon him or them the surname of *Edge*, and continue the same;" which may induce the court to believe, that he did not mean an executory devise. And for authorities to prove this a present devise, he cited 6 Co. 16. *Wyld's case*. Plow. 341. *Brett and Rigden*. *Snow and Cutler's case*. T. Raym. 162. 2 Keb. 296. and 1 Sid. 153. an authority expressly in point; wherein, tho' the court was divided as to the principal point, yet they all agreed, that if the devise were barely a devise to the heirs of the body of the wife, that *that* was a present devise. And to shew that in a will, if the devisor does not sufficiently describe the person, his words shall be taken strictly, tho' it be to make a devise void; he cited *Collingwood* and *Page's case*, 1 Sid. 193. and *Challenor and Bowyer*, 2 Leon. 70.

Another reason, why it shall not be taken as an executory devise, is, because it will destroy the remainder to the defendant, who was a person *in esse*, and capable to take at the time of the devise; for the remainder vested in him immediately upon the death of the devisor, according to the express authority of *Goodright v. Cornish* in B. R. Trin. 5 W. & M. rot. 20. A man seised in fee, devised his land to *John* his eldest son for fifty years, if

if he lived so long; and as for and concerning the said land and the inheritance thereof, after the expiration of the said term, he devised the same to the heirs males of the body of the said *John* his eldest son; and for default of such issue, to *Richard* his second son and the heirs males of his body, &c. The devisor died, *John* the eldest son entered and suffered a common recovery, to the use of the defendant; in which recovery *John* the eldest son was tenant to the *præcipe*: *John* died, and *Richard* likewise died, and the heir of *Richard* was the lessor of the plaintiff: And the court gave judgment for the plaintiff, because the recovery was not well suffered; inasmuch as *John* was not tenant of the freehold, for he had but a term for years devised to him, and afterwards to the heirs males of his body; which being contingent, could not vest, and consequently *Richard* was the first person capable to take, and the freehold vested immediately in him: And the court relied much on the case of *Challenor* and *Bowyer*. Most of the cases that seemed against him, he said might receive this answer, That in those cases there is a precedent estate limited, and then future words, which make the devise future; as in *Cotton* and *Heath's* case, 1 Ro. Abr. 612. afterwards implies futurity: So in *Bate* and *Amberst*, T. Raym. 82. remainder shews he intended the devisee to take futurely: And in a case cited in *Payne* and *Ferrall's* case, Noy 43. which is against *Bridgman's* opinion in T. Raym. 82, there is the word remainder, which tho' improper, for want of a particular estate of freehold to support it, yet was designed in nature of a remainder. So in *Taylor* and *Biddell*, *Richard Ben* devised his land to *Eliz.* his sister and heir, till her son *Ben* should attain 21, and at that age to *Ben* and his heirs; and if he die before that age, to the heirs of the body of *Robert Wharton*: The testator dies; *Ben* dies before age, living *Robert Wharton*; yet a good executory devise to *Mary* the daughter of *Robert Wharton*: But note, she was heir to *Ben*. He said the case of *Nurse* and *Yarworth*, 2 Mod. 8. of a devise to an infant *in ventre sa mere*, was directly contrary to *Goodright* and *Cornish*; but he admitted that a devise to an infant *in ventre sa mere*, may be good; tho' it was never solemnly resolved: But that differs from this case, for the law takes notice of him for the apparent expectation of his birth; and it has been held, that he may be vouched. Bro. Voucher 61. And in that case too the devisor takes notice that he is not yet born, but must take futurely; but here the special verdict and will being silent as to that, viz. whether the testator knew or believed *George Jaques* had or had not a son, nothing of that shall be presumed.

2. As to the second point, he gave such a history of executory devises, as Just. *Powell* had done before; and remarked, that *Child* and *Bayly's* case, 1 Ro. Abr. 613. concludes thus, "All the

justices

justices and barons said, they would not admit of a devise to exceed that in *Manning's* case, for the inconveniencies they had in view. The like in *Holmes and Plunket's* case, 1 Sid. 47. And in *Grey and Hopkin's* case, 1 Sid. 37. And in *Snow and Cutler's* case, 163. All signifying the discountenance that executory devises might expect. In *Carpenter and Smith*, 24 Car. 2. B. R. [a note of which is in 3 Keb. 122, 123. but the report he relied on was that of my lord chief justice *Treby*, cited in his resolution of *Lloyd and Carew's* case in Chancery ;] the council were so bold as to make it a question, whether there could be a limitation of a fee upon a fee, upon a contingency, at all ; tho' the opinion of the court was, that there might be such a limitation, so that it were upon such a contingency as would happen within the ordinary compass of time, that is, within a life or two. In *Goring's* case, Chanc' r. fo. 8. lord chancellor *Clarendon*, *Foster* C. J. C. B. *Hall* and *Wyndbam* agreed, that the limitation of a term to several persons in remainder, one after another, *in being and named*, could not tend to the intail of a chattel, or creation of a perpetuity ; but limiting it to a person *not in being*, did. And he concluded his authorities with the opinion of *Twisden*, Just. 1 Mod. 54. in *Love and Windbam's* case. He examined the case of *Cotton and Heath* in the same manner that *Treby*, C. J. and *Powell* had done before ; and answered it with the case of *Sir Henry Goring*, Chanc' r. 8. which is directly contrary. The cases of *Blandford* and *Blandford*, *Bate* and *Amberst*, and *Burgefs* and *Burgefs*, he denied to be parallel.

Taking therefore the devise to be void, the defendant will be let in ; for then it will be no more than tenant for years, the remainder to the defendant in tail ; for the words, "*and if the first son of George Jaques die without issue, or discontinue the name of Edge,*" do not stand by themselves, but are part of that estate which was void ; and when the estate itself is void, all the limitations which depend upon it will be likewise void. And for authorities thereof, he cited 1 Co. 154. Lord *Paget's* case. Mo. 193. 1 And. 259, 263. 7 E. 3. fo. 19. 3 Cro. 422. *Fuller* and *Fuller*. 2 Leon. 70. *Challenor v. Bowyer*. Therefore the judgment of C. B. was, in his opinion, well given ; and he prayed it might be affirmed.

And the judgment in C. B. was afterwards affirmed.

N. B. The foregoing case may be illustrated by a late determination of the court of King's Bench, in the case of *Fonnereau* and *Fonnereau* ; which, after two special arguments, was finally determined in *Michaelmas* term, 21 G. 3. The case in effect was thus : *Claude Fonnereau*, seised in fee, gave an estate for life, by deed, to *Thomas Fonnereau*, his eldest son. Afterwards, by will, reciting the estate for life, he gave estates in tail male, to the sons (successively) of the said *Thomas Fonnereau*, who should be

living at the time of his death; with remainders over; on their default, to his own second and other sons, successively, in tail male. *Claude Fonnereau* died; as did also *Thomas Fonnereau*, having first entered and suffered a recovery: Upon which an ejectment was brought by the second son against the claimants under the recovery. And two questions were made:

1. Whether *Thomas Fonnereau* was tenant in tail? For then the recovery he suffered would bar the plaintiff's title.

2. Admitting that he was not tenant in tail, whether the limitation over to the second son of *Claude Fonnereau*, for default of issue male from the first, was not too remote?

The first question was determined in the negative, that *Thomas Fonnereau* was not tenant in tail; for his estate for life being created by one instrument, and the estate tail in his issue by a different one, executed at a different time, it was held that they could not be united, so as to make him tenant in tail, as he would have been, if the estates had been created by one and the same instrument. The other question is particularly applicable to the argument of Mr. Justice *Blencow* in the foregoing case; for he supposes that the limitation to the first son of *Richard Conway*, under circumstances nearly similar, is too remote. But in this case of *Fonnereau* and *Fonnereau*, the court adjudged the limitation to the second son of *Claude Fonnereau*, to be consonant to the rules of law; and that it might be effected in two ways, according to the intention of the parties. First, if *Thomas Fonnereau* had died, leaving a son, an estate tail would have vested in that son; which he might have barred by a common recovery: And then the second son of *Claude Fonnereau* would have taken a remainder. But secondly, as *Thomas Fonnereau* did not leave a son, the court held that the second son of *Claude Fonnereau* might take by way of executory devise, and that it was not too remote. In support of this, they adduced the cases of *Stephens* and *Stephens*, 2 P. Wms. 323. *Hopkins* and *Hopkins*, 1 Vez. 268. and *Brownfword* and *Edwards*, 2 Vez. 243. And judgment was accordingly given for the plaintiff.

Trin.

Trin. Term, 1707.

6 Annæ Reginae, in B. R.

Johnson *versus* The Earl of Derby and Others.

In the Exchequer.

THIS was an ejectment, tried in *Lancashire*, and brought by John Johnson, (on the demise of John Earl of Anglesea, Henrietta Maria his wife, and Lady Elizabeth Stanley, spinster) plaintiff, against James Earl of Derby, Charles Stanley, Esq; Margaret Barton, widow, Oretb Barton, widow, Jeremiah Finch, Richard Leatherbarrow, Michael Middleton, William Gregory, John Swift, John Barton, Alexander Taylor, Anne Underwood, widow, Thomas, Charles and Henry Carter, defendants; for the manors of Bretherton, Skelmersdale, Ormeskirk, Ormeskirk cum Aughton, Upbolland and Latbom; and for divers parcels in Bretherton, Skelmersdale, Ormeskirk, Ormeskirk cum Aughton, Latbom, Dalton, Holland and Tarlescough; and also for the rectories and tithes of Holland, Upbolland and Dalton.

The jury find Anne Underwood and Jeremy Finch not guilty. And as to all, besides the manor of Ormeskirk, they find Margaret Barton, Oretb Barton, Richard Leatherbarrow, Michael Middleton, William Gregory, John Swift, John Barton, Thomas, Charles and Henry Carter, not guilty.

Charles Stanley they find not guilty; as to all, except the tithes of Dalton. Alexander Taylor they also find not guilty; as to all, except the manors of Bretherton, Skelmersdale, Holland and Upbolland: And as to them, they find the Earl of Derby and Alexander Taylor guilty. Damages 2*d.*; costs 40*s.*

doubted, whether costs are entire or distinct, or if these costs can be extended to the defendants in the special verdict, for which purpose see *Raft. Ent.* 256, 7. 678. *Plowd.* 347. 202, 3. *Clift.* 793. 800.

N. B. It was afterwards against the *Co. Ent.* 150.

As to Tarlescough, the rectories of Holland, Upbolland and Dalton, and the tithes in Holland, and also Crossball in Latbom; and all the premisses, except the residue of the manor of Latbom, 2000 acres of land in Latbom, parcel of the same manor, the manors

manors of *Ormeskirk* and *Newburgh*, 250 acres of land in *Newburgh* in *Lathom*, *Newpark* in *Lathom*, and the tithes of *Dalton*, the jury find, that the Earl of *Derby* is not guilty: And as to those, they find a special verdict.

That *William*, earl of *Derby*, was seised in fee of the said residue of the manor of *Lathom*, and 2000 acres of land in *Lathom*; the manor of *Newburgh*; 250 acres of land in *Newburgh*; and also of *Newpark*. And being so seised, to the intent that *Sir Thomas Leigh*, *Thomas Spencer*, *Edward Rigby* and *Thomas Ireland*, might convey the same to queen *Elizabeth*, her heirs and successors, and that the earl might accept a grant from the queen to him and his heirs male of his body; and for default of such issue, to the heirs male of the body of *Sir George Stanley*, formerly lord *Strange*; and should leave the reversion in the queen; infeoffed the said *Sir T. Leigh*, *T. S. E. R.* and *Thomas Ireland* and their heirs. And the said *Sir T. Leigh*, *T. S. E. R.* and *T. J.* being, by virtue thereof, seised in fee, &c. did, in pursuance of the said intent, by deed inrolled, convey the same (on the 8th of *December*, 43 *Eliz.*) to the queen, her heirs and successors: And thereby covenanted with the queen, that she should quietly enjoy against them, and all claiming under them; and for further assurance, at any time within five years.

That queen *Elizabeth*, in farther pursuance of the same intention, on the 7th of *January* following, by her letters patent, *pro diversis bonis causis & considerationibus, dicta regina specialiter moventibus, necnon ad humilem petitionem* of the said earl, conveyed the same to the said *William*, earl of *Derby*, and the heirs male of his body; and for default of such issue, to the heirs male of the body of the said *Sir George Stanley*, &c. to be held of the queen, her heirs and successors, by the service of one knight's fee.

That the reversion in the queen descended to king *James* the first.

That an act of parliament was made 18 Nov. 4 *Ja. 1.* whereby it was enacted, That the said *William*, earl of *Derby*, and the heirs male of his body, and for default of such issue, the heirs male of the body of the said *Sir George Stanley* should enjoy the last mentioned premisses; and that the king should hold such estate, right, title, interest and reversion, as if the act had not been made.

That the reversion descended to king *Charles I.*

That in the eleventh year of the reign of king *Charles I.* several differences arose between the said *William*, earl of *Derby*, and *James* lord *Strange* of the one part, and dame *Elizabeth Stanley*, widow of *Sir Robert Stanley*, (son of the said earl *William*, and brother to the said *James* lord *Strange*) and *Charles* and *James Stanley*, their two sons, of the other part; which differences were referred to king *Charles I.*

That K. Cha. I. the 11th of July, 11 *regni sui*, made his award under his privy seal, and ordered that the said *William* earl of *Derby* and *James* lord *Strange* should grant and convey, out of an estate of sufficient value, a rent-charge of 600*l.* yearly, payable quarterly to the said *Charles Stanley* and the heirs male of his body; and for default of such issue, to the said *James Stanley* and the heirs male of his body.

That king *Charles* I. afterwards by letters patent, of the 3d of July, 13 *regni sui*, reciting the letters patent of queen *Elizabeth*, the act of parliament, and the award, and to enable the lord *Strange* to perform the award, granted the reversion to the said *James* lord *Strange* and his heirs; to the use of him and his heirs, to be holden by the same service, &c.

And the king, by the same letters patent, willed and declared, that the said lord *Strange*, within a year after the date of the said letters patent, should cause the reversion to be so granted or limited, that the lands, &c. should revert to the king, in the same manner as if the letters patent had not been made; chargeable nevertheless with the rent-charge.

That 11 Aug. 13 Car. I. for performance of that award, an indenture inrolled in Chancery was made between *William* earl of *Derby* and *James* lord *Strange* of the first part, the lady *Stanley* and her two sons of the second part, and Sir *Henry Crofts* and Sir *Theobald Gorges* of the third part; whereby the said earl of *Derby* and lord *Strange*, as well for a provision for the lady *Stanley*, as for the said *Charles* and *James* her two sons, and the heirs male of their bodies; covenanted, within two years, to convey the same premises by fine to Sir *Henry Crofts* and Sir *Theobald Gorges*, and their heirs, to the intent that a rent-charge of 600*l.* should be paid to the said *Charles Stanley* and the heirs male of his body; and for default of such issue, to the said *James Stanley* and the heirs male of his body; and that the premises in question should go, chargeable with that rent, to the use of the said *William* earl of *Derby*, and the heirs male of his body; and for default of such issue, to the heirs male of the body of Sir *George Stanley*, lord *Strange*, grandfather of *Edward* late earl of *Derby*; and for default of such issue, to the use of *James* lord *Strange*, his heirs and assigns.

That 21 Aug. 13 Car. I. a fine was levied of the manor of *Latbom*, to the uses in the deed of covenant, and there were proclamations upon the fine.

That neither *James* lord *Strange*, his heirs or assigns, did within one year convey the reversion, so as the premises might revert to king *Charles* I. &c.

That earl *William* was seised by virtue of the estate tail, which descended to the said *James* lord *Strange*, and afterwards to *Charles* earl of *Derby*; and afterwards to *William George Richard*, late earl of *Derby*.

That *William George Richard*, being so seised, made an indenture, bearing date 18 *Aug. 13 Willielmi tertii*, and sealed and delivered it 30 *Aug.* Then follows the indenture in *hæc verba*, which appears to be a bargain and sale for a year, from the earl of *Derby* to *Thornton* and *Heys*, of the manor of *Latbom*, and of divers other messuages, lands, &c. in *Latbom*, *Ormeskirk*, and several other towns in possession of *A. B. &c.*

That the said *William George Richard*, late earl of *Derby*, made another indenture, dated 9 *Aug. 13 Willielmi tertii*, but first sealed by him 30 *Aug.* which indenture follows in *hæc verba*, and appears to be a release from the same earl of *Derby* of the same premises, in order to make *Thornton* and *Heys* tenants to the *præcipe*.

That at the time of sealing the two indentures, there were blank spaces left immediately after the words *John Harrocks*; in order to insert the names of other tenants of lands in the towns in those indentures mentioned.

That the writ of entry was sued out, &c. for the manor of *Latbom*, 19 *Aug. 13 Willielmi tertii*, returnable *primo die tunc proximæ sessionis generalis assisarum*.

That on the first day of the next assizes, *viz. Wednesday* the 3d of *Sep. 13 Will. tertii*, the writ was returned. The second day the earl, who is vouched and summoned, appears and vouches the common vouchee. And thereupon a recovery is suffered, and judgment for the demandants to recover seisin.

The demandants pray a writ of seisin, returnable *die Lunæ prox. futur. istâ eadem sessione*.

That on *Friday 5 Sep.* the spaces were filled up, with the names of several other tenants of lands in the said manors, villis, &c. which names were inserted by the said *Thornton*, party to the deed.

This is all as to the manors of *Latbom*, *Newburgh* and *Newpark*. The rest is as to the tithes of *Dalton*, and the manor of *Ormeskirk*.

As to the
tithes of *Dal-*
ton.

That *Edward* earl of *Derby* was seised in fee of the tithes of *Dalton*; and being so seised, 20 *Martii, 12 Eliz.* granted to *George* earl of *Sbrensbury* and several others, and to their heirs, all his hereditaments in *Dalton juxta Holland*, to the use of himself for life; remainder to his son *Henry* for 99 years, if the same *Henry* should so long live; remainder to the first son of *Henry*, and the heirs male of his body; remainder to the second son in like manner; with divers remainders over. That the said *Henry* had two sons, *viz. Ferdinando* and *William*. That *Edward* died seised, and thereby *Henry*, then earl of *Derby*, became seised and died; and thereby *Ferdinando* became seised, who died without issue male; and thereby *William* earl of *Derby* became seised in tail: So there is an estate in tail male vested in *William* earl of *Derby*.

That

That king *James I.* being seised in fee of the manor of *Ormeskirk*, 17 Oct. 5 Jac. I. by letters patent under the dutchy and county palatine seal, in consideration of 480*l.* 2*s.* 3*d.* granted to *William* earl of *Derby* and *Elizabeth* his wife, and the heirs male of the body of the said *Elizabeth*, the said manor of *Ormeskirk*, alias *Ormeschurcb*, lately belonging to the late dissolved priory of *Burscough*, under the rent of 22*l.* 17*s.* 3*d.*

As to the manor of Ormeskirk.

That the countess died; and that earl *William* died, so seised of the manor of *Ormeskirk* and tithes of *Dalton* as aforesaid.

That they descended to *James* earl of *Derby*. That *James* earl of *Derby* died seised; and they descended to *Charles* earl of *Derby*, who died seised; and they descended to *William George Richard*, late earl of *Derby*.

That *William George Richard* being so seised as aforesaid of the residue of the manor of *Lathom*, and 2000 acres of land in *Lathom*, parcel of the said manor; the said manor of *Newburgh*, and 250 acres of land, parcel thereof in *Newburgh* in *Lathom*; of *Newpark*, and of the messuage and 60 acres of land in *Lathom*, called *Newpark*; and the tithes of *Dalton*; 2 Aug. 29 Car. II. in consideration of 5*s.* made a bargain and sale for a year, by indenture, to *Heneage* lord *Finch* and others, of the manor of *Ormeskirk cum Aughton*, the said manor of *Newburgh*, and 250 acres, parcel thereof in *Newburgh* in *Lathom*, and also *Newpark* and the tithes of *Dalton*.

That 3 Aug. 29 Car. II. he made an indenture of release of the same premises to the same parties. The release is found in *hæc verba*, and (*inter alia*) is of the manor of *Ormeskirk cum Aughton*, the rectory of *Upbolland*, and tithes of *Dalton*, the manor of *Newburgh*, and the demesnes of *Newpark*, with the appurtenances; *habendum* to the use of *Heneage* lord *Finch*, &c. and their heirs, during the life of *Dorothea Helena*, then countess dowager of *Derby*, in trust to pay her 600*l.* *per ann.* quarterly for her life; and from and after her decease, then as for and concerning all and singular the last-mentioned manors, lands, and premises, except the said manor of *Upbolland* and the rectory of *Upbolland*, to and for the use of such person and persons, and for such estate and estates, and with such authorities powers and qualifications, and with such remainder and remainders, as in and by one act of parliament, begun and held by prorogation at *Westminster* the 18th day of *November*, in the fourth year of the reign of our late sovereign king *James*, is limited and expressed; and in such sort and manner as the same should have gone, if this present settlement had never been made. Power to make leases; and a covenant to levy a fine before the first day of *December* then next, to the uses in that deed.

A fine levied accordingly 20 *Aug.* 30 *Car.* II. with proclamations, of the manor of *Ormeskirk cum Aughton*; manor of *Newburgh*; 250 acres of land, parcel thereof in *Newburgh* in *Lathom*; of *Newpark*, and tithes of *Dalton*.

That there were not, at the time of making the said deed and levying the said fine, two several manors in *Lancashire*; one known by the name of *Ormeskirk*, and the other by the name of *Ormeskirk cum Aughton*.

They find the act of parliament mentioned in the release, and the said act of 4 *Jac.* to be the same. And that thereby the manor of *Whitcham* in the county of *Cambridge*, and the manor of *Bretberton* in the county of *Lancaster*, were limited to earl *William*, and the heirs of his body. But that the manor of *Ormeskirk*, or *Ormeskirk cum Aughton*, or the tithes of *Dalton*, are not limited in the said act; nor are contained or expressed or mentioned therein.

That the manor of *Newburgh*, and the 250 acres parcel thereof, lie in *Lathom*. That *Newpark*, at the time of the settlement, 29 *Car.* II. was parcel of the manor of *Lathom*; and has ever since been reputed parcel thereof. But that both *Newburgh* and *Newpark*, at the time of the settlement, 29 *Car.* II. and the recovery 13 *Will. tertii*, were in the possession of the said *Dorothea Helena*, countess dowager of *Derby*; and the said lord *Finch*, &c. *eisdem temporibus*, were seised thereof for the life of the said countess dowager.

That nothing was done by any king or queen, after the grant by queen *Elizabeth*, and after the act of parliament, besides the grant of the reversion by king *Charles I.* to hinder the reversion from descending to king *Charles II.* and to the present queen.

That earl *William* had issue *James*; that *James* had issue *Charles*; who had issue *William George Richard*; who died without issue male, the 4th of *November* 1702. That the defendant earl *James* is heir male of the body of *Charles*, and younger brother of the last earl, *William George Richard*, and great grandson and heir male of the body of the said earl *William*.

That the lessors, the countess of *Anglesea* and the lady *Elizabeth Stanley*, are daughters and coheiresses of earl *William George Richard*; and that on his death, they entered and made the lease to the plaintiff, *prout*, &c.

And whether the defendant (the earl) be guilty as to these, the jury submit to the judgment of the court.

There are several distinct points in this special verdict; some that concern one part of the land in question, and some another: And therefore I shall state the several points that relate to the several parcels.

Mr. Lutwych
for the plain-
tiff.

As

As to the manor of *Lathom*, 2000 acres of land in *Lathom*, and the premises in *Newbury* and *Newpark*, I shall make these questions:

1. Whether the grant from queen *Elizabeth*, of those premises, be within the stat. 34 H. 8.; so as to make the estate unalienable by that act?

2. Admitting the grant were within that act, whether the grant of the reversion by king *Charles I.*, to *James* lord *Strange* and his heirs, and the fine levied afterwards, have not totally taken away that quality of being unalienable?

3. Admitting that the premises in question from that time became alienable, whether the common recovery, suffered by the late earl of *Derby*, be sufficient to dock the entail of all those parcels?

And the last question will be, in relation to the manor of *Ormskirk*, and the tithes of *Dalton*; to what uses they shall be?

As to the first question, Whether the grant of queen *Elizabeth* be within the stat. 34 H. 8. cap. 20.? I take it, that it is not within the intent of that act.

The true meaning and intention of that act appears plainly and fully by the preamble of it; and the gifts of the crown mentioned therein, to which alone the act extends, are such as were made to the intent that recompence, for the service of the donees, should not only be a benefit to their own persons, but a continual profit to their heirs; that they might have in memory the profit they have by the services of their ancestors, done to the kings of this realm, and thereby be the better encouraged to do the like services. This, in express terms, is the recital of the act, and this was the plain intent of the act; and the body of the act refers to the preamble, and admits no other tenant in tail to be within the compass of it, but what is within the preamble; for it says *such* tenant in tail, &c. 2 Coke 15. b. *Wiseman's case*, Ref. 4.

E contra
were cited
2 Cro. 50.
Dy. 8. pl. 18.
Mo. 274.
Mo. 15.
1 And. 46.
Bend. 215.
1 Inst. 373.
Sid. 166.
Sav. 105.

The manor of *Lathom* was an ancient estate in the *Derby* family: There is nothing appears to the contrary, but that it had been in the family some hundreds of years before this grant.

It is found, that a very little before the grant from the queen, *William* earl of *Derby* was seised in fee of it: And in the grant itself from the queen, the lands are mentioned to have been the lands of *Edward*, a former earl of *Derby*; and it does not appear that the family was under any obligation to the crown for it.

The estate being thus in *William* earl of *Derby*, he enfeoffs Sir *Thomas Leigh* and three others, to the intent that they should grant it to the queen; and that the earl might accept from the

queen a grant to him in tail male; remainder to the heirs male of the body of lord *Strange*, grandfather of *Edward*, formerly earl of *Derby*; leaving the reversion in the queen.

For this purpose they are made trustees, to see this contrivance performed. Accordingly the trustees, 8 Dec. 43 *Eliz.* convey to the queen; and *Q. Eliz.* in pursuance of the same intention, by letters patent dated the 7th of *January* following, granted to *William* earl of *Derby* in tail male; remainder to the heirs male of the body of lord *Strange*, as was intended. These circumstances must be taken and considered together, to find whether this be a grant within the statute.

And we must humbly insist, that the meaning of the statute was, that the gift should originally flow from the crown. That it should be a bounty and recompence for services: And therefore, as the statute says, *their posterity might have in memory the bounty of the crown*. But this gift is no more than a new way of settling on the earl of *Derby* his own estate; nay, the advantage was rather to the queen, than from her to the earl. For he enfeoffed Sir *Tho. Leigh*, &c. expressly (as it is found) with an intent to leave the reversion in the crown; and it is so limited accordingly.

Can this be a consideration for his services? That the queen would be pleased to accept of a grant of a fee simple, and give him a less estate? No! It is plainly a design to bring that case within the act of parliament, which is not within the act.

There was an attempt made, in the case of *Wifeman*, 2 *Rep.* fo. 15. to bring the grant of a subject to be within the act, by limiting the reversion to the queen; but that was resolved not to be within the design of the act, which had regard only to those grants, that were originally made by the crown to subjects, in consideration of services; or such as were made by the provision of the crown.

And therefore they held in that case, that if the queen should procure a subject, in consideration of money, to grant lands in tail to one of her subjects, in consideration of services, that would be within the act. So that in all these cases, respect is had to the original bounty that proceeds from the crown. And therefore a grant from the queen, in consideration of money, is not within the act; and so it was resolved in *Dy.* 32. and 5 *Car. I. in Canc.* between the earl of *Nottingham* and the lord *Mounson*. The reason is, because it is not a gift proceeding from the bounty of the crown.

In our case it is nothing but a new invention of making a settlement that should not be barred. And for that reason, I hope the statute will be construed strictly.

The law has a long time laboured and fenced against perpetuities. Whenever any new attempt has been made, it has been suppressed as odious. 6 *Co.* Sir *Anthony Mildmay's* case, the first

first resolution. But this contrivance would effectually introduce them; for it is only conveying the estate to the crown, and taking an estate-tail back again.

It is no answer to say, that it can't be done without the consent of the crown. There are many things, that I may say without disrespect, the crown cannot lawfully do. The law will not depend upon a discretionary exercise of power; but restrains even the prerogative, in those things that are mischievous to the public. Now I would ask, if this practice should prevail, whether it would not be in the power of the crown, with the concurrence of the owner, to make a perpetuity of any man's estate whatsoever? If in this case of the earl of *Derby*, why not in any other case?

The statute *de donis* had introduced a general perpetuity; and if that statute had taken place in its full latitude, there had been but very little land to have been purchased at this day: But the policy of the law, in 12 E. 4. determined that a common recovery barr'd it; and that is taken notice of by *Coke*, in Sir *Anthony Mildmay's* case, with great applause of those judges who did it.

In that case, surely the act was considered *strictly*, as tending to introduce perpetuities; and yet there was a great deal to be said, that the intent of the act was not to admit the practice of common recoveries. But in our case, we only contend for such a construction, as is agreeable with the intention of the act, as well as the reason of the common law.

Before I leave this point, upon the patent of queen *Elizabeth*, I must beg leave likewise to insist, that it does not appear by the verdict, that the patent was in consideration of services. All that is said as to that is, that the queen, *pro diversis bonis causis & considerationibus dictam tunc reginam specialiter movent*, did convey. Now these words do not imply consideration of *services*, any more than consideration of *money*, or any other consideration.

The patent upon which the case of *Murray v. Eyton* was founded, was expressly *ob singulare & fidele servitium*. *Raym.* 261. Now the words *pro diversis considerationibus* may apply to such as are not within the statute. It is a case not at all controverted, that if the queen, in consideration of money, grants lands in tail, it is not within that statute. Therefore here the grant is neither brought within the intention, nor the words of the act. It must be in consideration of *services*.

The next question is, admitting the grant of queen *Elizabeth* were within the stat. 34 H. 8. Whether the grant of the reversion by king *Charles I.* to *James lord Strange* and his heirs, and the fine levied afterwards, have not totally taken away that quality of being unalienable?

First, it must be agreed, that tho' an estate tail is created by the crown within the act, the reversion being in the crown; yet if the reversion be granted out of the crown, then the estate tail becomes

Anf. It must be intended services, for if it had been for money, it would have been so mentioned.

becomes barrable by a common recovery. That was never disputed; and it is so laid down by my lord *Coke*, 1 *Inst.* 372. a. in his second observation on this statute.

Now the letters patent of king *Charles I.* are very full to vest the reversion in the lord *Strange* and his heirs; for thereby he grants the reversion, *eidem Jacobo domino Strange, hereditibus & assignis suis, ad solum & proprium usum ipsius Jacobi hereditum & assignorum suorum in perpetuum.*

What is there that takes away the force and effect of this grant of the reversion, to him and his heirs? It is objected, that there is a clause in the same patent to this effect: That the king, by the same patent, wills and declares that the said lord *Strange* should, within a year, cause the reversion to be so granted or limited, that the lands and premises should revert to the king, in the same manner as if the letters patent had not been made; chargeable nevertheless with a rent-charge, which the earl of *Derby* and the lord *Strange* should grant, according to the king's award.

It was said, at the assizes, that this would amount to a condition; and because the reversion was not conveyed back again to the king, within the year, therefore the reversion was in the king at the year's end; and that preserved the estate tail from being barred. As to that, I must insist:

1. That the words do not amount to a condition.
2. If it were a condition, That it will not have that consequence, to preserve the estate tail from being barred.

As to the point of the condition, neither the words nor the intent of the patent import a condition.

The words are, 'The king wills and declares, that the lord *Strange* or his heirs, within a year after the date of the letters patent, should cause the said reversion so to be granted or limited, that the lands might revert to the king, in the same manner as if the letters patent had not been made; chargeable nevertheless with the rent-charge, which the earl of *Derby* and lord *Strange*, or one of them, should convey and assure.' These words are not proper for a condition. The king hereby expresses his will and pleasure, that the lord *Strange*, as soon as he had conveyed the rent-charge, should grant the reversion back again; but there are no words to signify an intent that it should be a condition. By virtue of those words, the party, by accepting the patent, becomes liable as in case of a covenant; as in the case of *Brett v. Cumberland*, 2 *Cro.* 399, 521. 3 *Bul.* 163. But the reversion was never intended to come back to the crown, any otherwise than by the limitation of the lord *Strange* or his heirs: For the words are, 'That he or his heirs should cause the reversion to be so limited, that the manor and premises should revert to the crown.' The main intent of that clause

was, to preserve the queen's right in the land, in case of failure of issue male. And it is remarkable, that the words are "*so that the manor and premisses should revert to the King again*"; That is, after the estate tail spent, the king or his heirs should have the manor and lands again. There is no more implied by the words.

And as for the *intent* of that clause, it can never be intended, that the meaning of it was to revest the reversion, to preserve the estate tail within the statute. That construction would destroy the whole frame and design of the patent. The plain design of this grant appears to be, to enable the parties to bar the estate tail, and thereby let in the rent-charge, which was awarded to be given; and that after the estate tail spent, the King or his heirs should have the estate.

Suppose the King's will and pleasure, thus declared, had been performed throughout, and that, upon the fine levied, the reversion had been limited to the King and his heirs; certainly that would not have made the estate unalienable; for the fine was levied by *William Earl of Derby* and the *Ld. Strange*, whilst the reversion was in the *Ld. Strange*. That can't be contradicted by the other side; for without dispute the reversion passed till the year was out, and within that year, whilst the reversion continued in the *Ld. Strange*, the fine is levied. Surely then that fine barred the estate tail, which was then in being. And there were uses limited by the fine; For first, the rent-charge of 600*l. per ann.* is by way of use, and can arise no otherwise than out of the estate of the conusees of the fine: And then the uses are, to the *E. of D.* in tail male, remainder to the heirs males of *Sir Geo. Stanley*, formerly *Ld. Strange*. This is a new estate; and under this estate the *E. of D.* is found to be seised, and that it descended. And the remainder is to the then *Ld. Strange* and his heirs.

The main intent, of granting the King's reversion, was to make the rent-charge good; for before the granting of the rent-charge, admitting the grant of *Queen Elizabeth* to be within the stat. of 34 *H. 8.* the tenant in tail was as much disabled to grant a rent-charge, to bind his issue in tail, as he was to alien the land it self. And therefore there is nothing, but the barring that estate tail, which can make good the rent-charge. And when the estate tail is once barred, the estate can never afterwards be capable of that quality of being unalienable. Where it is once aliened, it is alienable for ever after.

In case of a lease for years, with a proviso not to alien without consent, if the lessee has *once* licence to alien, the condition is dispensed with for ever after. So in this case, when the reversion was once granted out of the crown, and a fine is levied, *that* effectually bars the estate tail. And when the estate tail is once barred, certainly it can never revive again. And therefore, tho' I think there is no reason that this clause of the King's will

and pleasure should be a condition, yet admitting it to be a condition, I can't see how it can possibly stand with the rules of law, that because the reversion is reversioned in the crown, therefore that quality belonging to it, of being unalienable, revives. That quality was annexed to an estate tail, which was barred; for without dispute the grant of the reversion passed for the year, and during that time the fine is levied.

The nearest case that I know of is a case in *Hardr.* 409, the Earl of *Chesterfield's* case. Upon a special verdict it appeared, that the King made a gift in tail, reserving the reversion to himself; and afterwards gave leave to the tenant in tail to suffer a common recovery; and in order to that, passed the reversion out of himself, and lodged it in others, to have it reconveyed to him again afterwards, which is done accordingly: It was adjudged, that the tenant in tail or his heirs may bar this estate tail, and that this is not within the stat. 34 H. 8. which restrains from aliening; because the reversion was once severed from the crown. And the statute is intended to restrain, only where the reversion continues in the same plight that it was in at first, without any alteration.

And agreeable to this, is *Gardiner's* case, 14 Car. 2. that was cited in the case of the E. of *Derby*. It is mentioned in *T. Raym.* 350. King *Henry* 8 gave lands to *Mich. Stanhope* and his wife, and the heirs of their bodies; the lands descend to issue in tail, who petitions the Queen to grant the reversion to some persons in fee, to the intent that he may make a lease for 99 years, by way of mortgage; and enters into a recognizance to the Queen, that nothing shall be done, whilst the reversion is out of the crown, prejudicial to the Queen. The Queen conveys the reversion to *Ld. Burley* and *Sir Walter Mildmay*, in fee. *Tho. Stanhope* makes a lease, and then suffers a recovery. The trustees reconvey to the Queen. And it was resolved, 1. That it was a good grant; 2. That *Tho. Stanhope* was not restrained from aliening.

The reconveyance in that case did not invalidate the lease for years; and if there had been a reconveyance, in our case, it would not have preserved the estate tail from being barred.

Ans. The whole reversion was not granted out, but part remained to protect the estate. A right only to the reversion will preserve it.
8 Co. Ld. Stafford's case.

And to the same purpose is the case of *Gardner* and *Bambridge*, which is cited in the E. of *D.'s* case, 2 Jo. 251. and is probably the same case with the last. The King, to enable his donee to make a long lease by fine, granted his reversion, and after the fine resumed it; it was resolved that this lease was good against the issue: And this case *Just. Jones*, who takes notice of it, agreed, tho' he was of opinion for the E. of *Derby* in that case; But he makes a difference between that case and the E. of *D.'s*, because in the E. of *D.'s* the reversion was never out of the crown.

Now

Now, in our case, the reversion was out of the crown, at the time of the fine levied; and upon that there was a new estate tail created. The estate tail, that was created by the uses of that fine, was not of the gift of the crown; but, according to the express words of the patent, must be by the *E. of D.* for it is *that be or the Ld. Strange should convey and assure the rent charge*; and that could not be done without barring the estate tail. He has accordingly assured the rent charge by the fine; and has thereby barred the estate tail. The uses of that fine are a new estate tail, not of the gift of the crown; and that estate tail was barrable.

If so, the next question will be, Whether, admitting the estate tail was barrable by the late *E. of Derby*, the common recovery, suffered by him, be sufficient to bar the estate tail?

As to the recovery, it is objected, that in the deeds, to make tenants to the *præcipe*, there were spaces or blanks left, in order to insert the names of other tenants; and that the filling up of those blanks has vitiated these deeds, so that the recovery is deficient for want of tenants to the *præcipe*. The right stating of this part, as to the time, will go a great way to answer the objection.

It is found that the deeds, to make tenants to the *præcipe*, were sealed the 30th of *August*. That the writ of entry was returnable on *Wednesday* the 3d of *September*, which was the first day of the assizes; and then the judgment was had. That the filling up of those blanks, which is objected, was not till the *Friday* following, which was the third day of the assizes.

By these circumstances it appears plainly, that there was a good tenant to the *præcipe* of all that we contend for, and the deeds remained good till *Friday* in the assize week: And if so, the judgment being given the first day of the assizes, there was then without dispute a good tenant to the *præcipe*. When the judgment is once given, the tenants to the *præcipe* are of no further use: And therefore it is, that in common experience, a tenant for life, in order to make a common recovery good, surrenders the estate upon condition to do a future act, at any short time after the recovery; which is very safe, because it suffices that there was a tenant to the *præcipe* at the time of the recovery.

Nay, if the writ of entry be rightly brought, against one who is tenant of the freehold, tho' he alien pending the writ, the recovery is good.

But here, in our case, the alteration of the deed could not take the freehold out of them, in whom it was well vested before.

And therefore there is a great difference between the rasure or interlineation of a bond, and of a deed of lease; for in the case of the bond, the specialty is the essence of the debt; but in the case of the lease, the estate may have it's essence without deed,

for a man may plead *dimisit*, without mentioning a deed. And that difference is taken in the case of *Miller and Manwaring*. 1 *Cro.* 397. *Jo.* 352. 2 *Ro. Abr.* 29. *pl.* 6. And there a case is cited to prove that rasure of a deed of feoffment does not avoid the estate. And the stat. of frauds does not alter the case.

In *Mo.* 35. 36. *pl.* 116. A lease was razed, and one of the parcels put out of the deed; therefore it was held void for the whole as a deed, but (by *Dyer*) it may still be pleaded as a lease *parol*.

The spaces in this case were left, to insert the names of other tenants; and therefore, tho' we should admit that it were void as to those particulars, none of which are now in dispute, yet it is good for the rest. 2 *Lev.* 35. *Zouch and Clay's case*; *A.* and *B.* seal a bond to *C.* and then *D's* name is interlined; That does not vitiate the bond as to *A.* and *B.* And to the same purpose is *Mo.* *pl.* 730.

But we do not think it concerns us, whether it now be a deed or no. It suffices that it was one at the time of the recovery.

As to *New Park*, that we hope will pass by the name of the manor of *Lathom*. The objection is, that, by the settlement of 29 *Car.* 2. it is found to be conveyed for life, &c. On the other hand, it is expressly found, that at the time of the settlement, 29 *Car.* 2. it was parcel of the manor of *Lathom*; and has ever since been reputed parcel. Now in case of a conveyance, lands, that are not in strictness part of the manor, may pass by the name of the manor, if they are only reputed parcel. And so is *Sir Moyle Finch's case*. 6 *Rep.* 66, 7.

And there is no difference, where it is a recovery and where it is a bargain and sale; nor any difference between a *real* and *reputed* manor, or between lands *being* and others *reputed* to be parcels. 1 *Lev.* 27. *Tynne and Tynne's case*. Same case, 1 *Ventr.* 51. 1 *Sid.* 190. And that the reversion is parcel of the manor. *Lit.* 590. 1 *Inst.* 324. 325. and the several books there cited in the margin. 18 *Aff.* *pl.* 2, &c. 2 *Roll. Abr.* *pl.* 3. *Bro. Tit. Manor* 3.

Fig. on Rec.
46, &c.

The difference is, where the whole manor is granted, excepting one acre, and where one acre is granted out of the whole manor; in the one case, the part excepted cannot be a part of the manor, that is in reversion; but in the other, the reversion of that one acre may be a part of the manor, which still remains in possession. 6 *Rep.* 55, 66.

As to *Newburgh*, that is found to be in *Lathom* afore said; and that is sufficient ground for a reputation, that it was parcel of the manor.

There are likewise 2000 acres in *Lathom*, comprised in the recovery; and the deeds, to make tenants to the *præcipe*, comprise all lands in the tenure of the *E. of Derby*.

The

The last question is, to what uses the manor of *Ormeskirk*, and the tithes of *Dalton*, shall be?

As to the tithes of *Dalton*, it was found, that *Edward* Earl of *Derby* was seised in fee of these tithes, and settled them to the use of himself for life; remainder to his eldest son *Henry* for 99 years, if he so long lived; remainder to the first son of *Henry*, and the heirs males of his body; remainder, in like manner, to his second son. That *Henry* had issue, *Ferdinando* and *William*. That *Edward* E. of *Derby* died seised; and thereby *Ferdinando* became seised in tail male, and died without issue male; and thereby *William* E. of *Derby* became seised in tail male.

As to the manor of *Ormeskirk*, it was found, that *K. James's* being seised in fee of the manor of *Ormeskirk*, granted it by letters patent, in consideration of 480*l.* 2*s.* 3*d.* to *William* E. of *Derby* and *Elizabeth* his wife, and the heirs males of the body of *William* E. of *Derby*. And under this entail, both the manor of *Ormeskirk* and tithes of *Dalton*, descended to *William Geo. Richard*, the last E. of *Derby*.

So that there seems to be no dispute, but that *William Geo. Richard* was tenant in tail, at the time of the settlement 29 *Car.* 2; and therefore the question will be, to what uses the fine levied 29 *Car.* 2. will enure.

The words are, 'To the use of such person and persons, and for such estate and estates, and with such authorities powers and qualifications, and with such remainder and remainders, as in and by one act of parliament, &c. are limited and expressed; and in such sort and manner as the same should have gone, if this present settlement had never been had or made.'

Now it happened that there were no limitations at all in the act, concerning these parcels; and therefore it ought to be to the use of the conusor and his heirs, for it is in effect the same case as if no uses at all had been declared. Indeed it is found that other manors were limited to the E. of *D.* and the heirs of his body; and if that shall be intended to be the limitation, the title is with us, as heirs of the body of the late E. of *Derby*.

It appears plainly that it was supposed, by those who drew the deed, that there were uses, concerning those parcels in the act of parliament; and therefore, there being none, it ought to be as if no use at all had been declared. And the words which follow, viz. "As the same should have gone, if this present settlement had not been had or made" are but accumulative words, to shew that the intent was, that it should go according to the act. For admitting those latter words stood singly by themselves, they will not be complete sense; and the former words "To the use of such person and persons, and for such estate, &c." will not alter the case; for if that present settlement, which was the lease and release, had not been made, the fine, which was subsequent, would

have stood without any uses declared : and consequently will enure to the conuser and his heirs.

As to the name of *Ormeskirk cum Aughton*, that will be very sufficient to pass the manor of *Ormeskirk*.

1 Co. 46. There were two manors, *Ryton* and *Conder*, and K. H. 7. grants *Manerium de Ryton and Conder*; it was held in the case of the King the grant was void : But in case of a common person (the book says) without doubt it would have been good. If so, there is very little difference between that case and this; for here is *Manerium de Ormeskirk cum Aughton* : if it had been *Manerium de Ormeskirk and Aughton*, the manor of *Ormeskirk* would have passed, according to the authority cited; and there is very little difference between *Ormeskirk* and *Aughton*, and *Ormeskirk cum Aughton*.

But there is another case cited in that case of *Allonwood's*, which comes nearer this case. Queen *Elizabeth* granted *illum Manerium de Milberne cum Sapperton* in Com. Lincoln: That in the case of the Queen was not good; and yet without question (says my Ld. Coke) it would have been sufficient in case of a common person.

Hob. 123. In *Pitts* and *James's* case, where he commends the ingenuity and subtilty of Judges, who employ nicety in helping the intent of the parties; and for that purpose to mould the small disorders of the name, to make good the contract.

In this case the grant will be void, if it has not this construction; for nothing at all will pass, because it is found that there is no such manor as *Ormeskirk cum Aughton*.

Upon the whole matter, As to the manor of *Latbom*, We humbly hope, that there was originally no foundation, for that manor to be within the meaning of 34 H. 8. If it were, yet the grant of the reversion, out of the crown, has taken away that quality which the statute gives; and consequently, when the estate tail was once well barred, the new estate was capable of being barred again. And if so, the recovery has done that effectually, and comprehends the whole manor of *Latbom*.

And having drawn some short conclusions, from the other two points, he concluded.

The case being argued, Ld. Ch. Bar. *Ward* was of opinion with the defendants, as to the manor of *Latbom*, &c. on the statute 34 H. 8. which restrains tenant in tail, of the gift of the crown, from aliening; against the opinion of the other three Barons, who held the intail in this case to be a fraudulent conveyance, not within the meaning of the statute. The case on the statute of mortmain was cited, as it appears in *Farmer's* case, 3 Co. 78. b. and more largely in the case of *Magdalen College*, 11 Co. 73. 4.

As

As to filling up the blanks after the first day of the assizes, they all agreed, that being by consent of the parties, though the word inserted might be void, it could not avoid the deeds, as to what was contained in them at the time of the sealing: And besides, the deeds had then done their office, and made a good tenant to the *præcipe* for the manor of *Latham*, and what was comprised in the deeds the first day of the assizes.

As to *Newburgh* and *Newpark*, Bar. *Price* cited the case in 1 *Inst.* 324. that if a lease for life was made, the reversion remains parcel of the manor; which was not denied by any of the Barons, and seemed to be agreed by all. But they distinguished this case; as being by deed and fine, and held it therefore a discontinuance and a temporary severance, during the life of *Dorothea Helena* countess dowager of *Derby*; and therefore the recovery was void as to these, for want of a good tenant to the *præcipe*.

For other authorities, vide *Pig.* on rec. 215, &c.

And judgment was given accordingly.

Trin. Term, 1707.

6 Annæ Reginae in B. R.

Hudson versus Jones.

IN *replevin* for taking a bag and 270 ounces of gold, 25 *Junii* 1706; the defendant makes confession, as bailiff of *Henry Cornwall Esq;* *William Bissell* and *William Ball*, for that the *locus in quo* is a messuage in *Lombard-street, London*, whereof *Edward Bakewell Esq;* 27th of *December* 1678, was seised in fee; and being so seised, by indenture of lease and release of the 27th and 28th of *December* 1678, conveyed it to trustees and their heirs, to the use of himself for life, remainder to the use of his son *John Bakewell*, with divers remainders over. That, 1 *November* 1684, the said *E. B.* died seised, and *J. B.* entred as in his remainder, and was seised; and being so seised, 22d of *November* 1684, made a lease to the plaintiff *Hudson* and to Sir *John Parsons*, of the said messuage, for 21 years from *Midsummer* 1686, rendering 240*l.* yearly rent at the four usual feasts.

Salk. 90. S. C. but not so fully reported. Hob. 72.

That

That the plaintiff and Sir *John Parsons* entred, and were possessed; and being so, and the said *J. Bakewell* being seised of the reversion for his life, the said *J. Bakewell*, by indenture of the 24th of *March* 1689, in consideration of 1000*l.* bargained and sold the reversion to the said *H. C. W. B.* and *W. B.*; *habendum* for 99 years, if the said *J. B.* so long lived; by virtue whereof they were possessed of the reversion, and afterwards, *viz.* 1 *September* 1701. *W. Bissell* died; and for 1080*l.* of the rent aforesaid, for four years and an half ending at *Midsummer*, 1706, the defendant makes confuance.

The plaintiff in bar to this confuance pleads, that after the grant of the reversion to *H. C. W. B.* and *W. B.* *viz.* 25 *Martii* 1690, being the very next day, the said *H. C. W. B.* and *W. B.* by indenture made between them of the one part, and the said *John Bakewell* of the other part, *concefferunt præfato Johanni Bakewell reversionem messuagii prædicti in quo, &c. cum pertinentibus; habendum* from the day of the date of the said indenture for 98 years, if the said *J. B.* lived so long; *ad quam quidem concessionem prædicti Johannes Parsons et Rogerus Hudsons adtunc et ibidem attornaverunt*: By virtue whereof the said *John Bakewell* was possessed of the reversion for 98 years, if he lived so long; and that the said *John Bakewell* and his assigns were thereof possessed, from the day of the date of the said indenture last mentioned, to the time of the taking, *necnon prædicto tempore quo, &c.*

The defendant replies to this plea, that *prædicti H. C. W. B. et W. B. non concefferunt præfato J. B. reversionem messuagii prædicti in quo, &c. modo et formâ prædictis querens superius inbarrâ ad cognitionem prædictam placitando allegavit; Et de hoc ponit se super patriam*: And upon this issue was joined.

At the sitting after *Easter* term 1707, this issue was tried at Guildhall before *Holt* Ch. J. And at the trial the plaintiff, to prove his issue, produced only the answer of *Cornwall* to a bill in chancery, to which the plaintiff was no party; and in that answer *Cornwall* confessed that the conveyance by *J. B.* to him, *W. B.* and *W. B.* was in trust for *H. C.* only, and was made with intent to secure a rent-charge of 140*l.* *per annum*; and thereupon the said *H. C. W. B.* and *W. B.* by indenture of the 25th of *March* 1690, did redemise, &c. rendring 140*l.* *per annum*.

It was not pretended at the trial, but that this answer was good evidence, that there was such an indenture as he mentioned: But it was objected, that though there was such an indenture, yet there being no attornment to it, that indenture was no grant; but was void, so as to operate as a grant, without attornment: and that upon this issue of *non concefferunt modo et formâ*, they might shew any thing that makes the grant void and ineffectual.

The Ch. J. was of opinion, that since the plaintiff had expressly alledged an attornment to the grant, the defendant might have traversed it, if he had thought fit: but having joined issue,

only

only on the grant, the plaintiff had sufficiently proved his issue; for it is a grant, tho' not made effectual by attornment, and the grantors had done all they could do to make it a grant.

This he said was his opinion at that time; but he offered to the defendant's counsel to save the point: Whereupon a verdict was given for the plaintiff, and a rule made that a case should be made of it for the Ch. Just. opinion. And, being attended at his chambers upon that point, he continued of the same opinion; and said that, in pleading such a grant, attornment was necessary to be pleaded, for which he cited *Co. Ent.* 701. where a traverse is taken upon the attornment only: And if it were included in *non concessit*, it could be to no purpose to plead it.

But he still offered the defendant's counsel, that if they were not satisfied with his opinion, they might move the court, which they accordingly did in *Trin.* term following.

For the defendant it was said, that though there was an indenture, purporting to be a grant, yet the reversion was never granted; because there was no attornment: And the issue is upon *concessit modo et forma*, which takes in and includes the effect and operation of that grant. And that attornment is necessary; they cited 1 *Inst.* 551. 567. *Perk.* 114.

That the definition of a grant by my *Ld. Coke*, (1 *Inst.* 172.) is a conveyance of a thing that lies in grant; and a conveyance it cannot be, in this case, without attornment.

In other cases, the issue of *non concessit* includes the effect of the grant, as in *Eden's* case, 6 *Co.* 15. where the issue was *Regina non concessit per literas patentes*, and there the letters patent are admitted; But the issue is (as that book expressly says) upon the effect of the grant, as that the Queen has nothing in the land, and that nothing passed. And to the same purpose was cited 4 *Co.* 71. And *Hob.* (156.) says, that they are no grants which have no force; and therefore against the King's grant you may plead *non concessit*, if it were not his to grant; and where the party had nothing to demise, *non dimisit*.

If the attornment in this case had not been alledged, it would have been helped after verdict: And so is *Raym.* 487. *Hitchins* and *Stephens's* case. 2 *Ja.* 217. 2 *Ro. Rep.* 489.

In the case of a feoffment of a manor, the services do not pass without an attornment; and yet there it is not necessary to shew the attornment.

And *Litt.* §. 567. says that in case of a grant of a reversion, expectant upon an estate for years, the attornment comes in lieu of the livery, in case there were no estate for years.

And for an authority in point they relied on a case put in *Dy.* 31. where by the opinion of *Fitz.* and *Knightley* against *Sbelley* it is held, that where a grant is pleaded, in case there were no attornment, the party may either say *ne granta pas*, or *riens passa*

per le fait; and so are the opinions of *Broke* and some other Judges, in 14 H. 8. 21.

E contra, it was said, by Mr. *Lutwyche* of counsel for the plaintiff, that this was a special issue, and nothing ought to be comprehended in it but what is necessarily implied. The grant and the attornment are distinct things, and to be done by different persons; and in this case they are distinctly alledged, and the party has taken issue upon one, and therefore the plaintiff ought to come prepared only to prove that one fact.

It was laid down, as a certain rule in pleading, that in case of a grant of a reversion, attornment was necessary to be pleaded, and was constantly so pleaded; and so are the precedents. Indeed there are some cases where the want of it after a verdict may be helped; as 3 Cro. 259. *Gurney v. Clere*. 3 Keb. 198, 9. but those cases make a difference between a verdict and a demurrer: And that issue has been taken, appears by Co. Ent. 701. *Hern*. 632. And it is no argument that because the verdict helps it, therefore it shall be intended to be proved at the trial, or implied in the issue: As in the case 1 Sand. 266. want of averment, that the cattle were *levant* and *couchant*, is helped after verdict, where the issue was upon the prescription for common; and yet upon that issue it could never be supposed to be proved.

But the true reason why it is helped is, because the party does not demur; but takes issue upon another matter.

As to the instance of a feoffment of a manor, though the services in that case do not pass without attornment, yet attornment in that case is never pleaded; for there can be no feoffment of a manor, without attornment, whereby the services pass.

In this case, there is an attornment expressly alledged, and the defendant might have traversed it.

And there is no inconsistency in it, but that it may be a grant without attornment; for if making the deed be not the grant, the grantor does nothing, nor can do any thing, to make it so: And therefore it differs from the case in *Hob.* where the party had nothing in the thing; but here this grant is capable of passing the estate, any time during the lives of the parties.

And besides, the very pleading of the attornment shews it to be a grant before attornment, for it is *Ad quam quidem concessionem attornavit*.

And as a further authority, that it was a grant even before attornment, the case put in *Perkins*, tit. *Condition*, 141. §. 729. and 730. was cited; that if a lease for years was made with condition, that if the lessor grants the reversion during the term, the lessees should have the fee: Tho' the reversion is not in the grantee before attornment, yet the lessor (says the book) has granted it; and against that he cannot plead *ne granta pas per le fait*.

The court took time to consider of this matter; and at the latter end of *Trinity* term 1707, they all delivered their opinions,

that the plaintiff, upon this issue, need not prove any attornment, because it was not within the issue.

Holt Ch. J. It is certain that in pleading a grant of a reversion, an attornment is absolutely necessary to be pleaded. Indeed it has been a question, whether a place is necessary to be alledged, where the attornment was; because where no place is alledged, it shall be intended to be done upon the land: But whether a place be necessary or not, a place must be alledged. *Raft. Ent.* 575, 6.

As to the case of a feoffment of a manor, attornment of the tenants need not be alledged; *2 Cro.* 636. *Smith v. Melfer*, altho' *Yelv.* 135. be otherwise.

As to the issue in this case, it is a special issue, and therefore does not include the attornment. And as for what was said, of a verdict helping the want of averment of attornment, It is true that a verdict, upon the *general* issue of *nil debet* in debt for rent, will help it; and so was the said case of *Hitchins and Stephens in Raym.* But where it is upon a *special* issue, I know no case where it is said to be helped, but that of *Gurney and Clere*, *2 Cro.* 259. *there* a grant was pleaded without attornment, and issue upon *non concessit*, and found *quod non concessit*, and therefore in that case it was not necessary whether there was attornment or not; for there was not so much as any grant. Therefore I don't take that to be an authority, that in case a verdict find *quod concessit*, it will help the want of alledging attornment.

But see in Lit. rep. 313. a case cited per Richardson ch. j. that if the jury find *quod concessit*, the want of alledging attornment is not a sufficient exception in arrest of judgment.

But however here an attornment is alledged, and the party might have traversed it; but he has not, but taken issue upon the *concessit*.

Powell. I conceive this issue is very well found for the plaintiff. That short case in *Dy.* where this case in question was put, seems to be a sudden opinion: And so likewise, those opinions in *21 H. 8.* are but *obiter*.

The reason I go upon is, that this is a *special* issue, distinct from the attornment: The grant of a reversion does not imply an attornment, and therefore it must of necessity be alledged.

There is a case in *2 R. 3.* where the court held the party to alledge a place, where the attornment was; but certainly it is good without alledging a place, for it shall be intended to be done upon the land. *29 H. 6.* 32. *5 H. 7.* 24. *10 H. 7.* 16. *Dy.* 28.

The case of a feoffment of a manor differs. A manor is an entire thing, and must be pleaded as an entire conveyance. It is true the services do not pass without attornment, but when attornment is had, it relates to the livery; otherwise the manor would be destroyed. *3 Co. Butler and Baker's case.* *Fitz. Attornment* 20. That after attornment the services pass from the time of the feoffment.

As to the objection, that the defendant may shew any thing upon *non concessit*, that will make the grant void, I answer, that tho'

tho' it is void in its effect, yet it is the grant of the party. It is like the case of an infant. Where a deed is delivered by an infant with his own hand, he can't say *non concessit*, because it is his deed, tho' 'tis avoidable. And besides, there are two distinct things alledged, the grant and the attornment, and issue only upon one.

As to the case that was cited out of *Perkins*, it seems to be law; for though there is no attornment, yet it is a grant *tiel quel*, and will make the fee accrue by breach of the condition.

Powis and *Gould* were of the same opinion; because the grant and the attornment were distinct, and issue taken only upon one of them. That which made Just. *Powis* doubt was, whether *modo et forma* did not take in matter of attornment; but he cited *Dy. 116.* that it ought not.

Holt Ch. J. As to what was said, that in case a man has nothing in the land, he may plead *non dimisit*; in some cases he may plead that, and in some cases not.

In debt for rent *non dimisit* is a sort of general issue, and therefore in that case he may plead it; but if it were alledged in a bar, that the plaintiff was seised in fee and made a lease, and the plaintiff replied *quod non dimisit*, and issue were joined thereon, he could not give in evidence that he had no estate in the land; this being a special issue.

And judgment in the principal case was given for the plaintiff.

N. B. This case happened before the statute of 4 & 5 *Ann. c. 16.* for the amendment of the law, which by superseding the necessity, abolishes the doctrine, of attornments. The question therefore could not have arisen since the statute; but the doctrine may serve to elucidate the principles of pleading.

Alexander George *versus* Thomas Veasey, Bart.

On Error, in B. R.

Intratur Trinitatis octavo Annæ reginæ, rotulo 446.

Formedon in
discender.
Le forme de
breve d'error,
lou le banc
de reigne in
Hiberniâ ad
reversu un
Jud. done
per le com.
banc la; mes-
ceo reversall
fuit insuf-
ficient.

ANNA Dei gratiâ magnæ Britannia, Franciæ, et Hiberniæ, regina, fidei defensor: Prædilecto et fideli consiliario nostro Ricardo Pyne militi, capitali justiciario nostro ad placita coram nobis in Hiberniâ tenendum assignato, salutem: Quia in recordo et processu, ac etiam in redditione judicii loquelâ quæ fuit in curiâ domini Willielmi tertii nuper regis Angliæ, &c. coram Ricardo Cox milite et sociis suis, tunc justiciariis ipsius nuper regis de banco in Hiberniâ, per breve ejus de formâ donationis en le descender, inter Alexandrum George petentem et Thomam Veasey baronnetum tenentem, de uno messuagio et uno gardino cum pertinentibus

inentibus scituat' jacent' et existent' in villâ villato sive hamleto de Maryburrogh in comitatu reginæ, et septuagintis et duabus acris terræ arabilis, octo acris pasturæ, septendecim acris bosci et subbosci, et septendecim acris moræ aquosæ, cum pertinentibus, in villâ villato sive hamleto de Tower, alias Togher, et campis ejusdem, cum pertinentibus, in comitatu prædicto; quæ quidem recordum et processus, causâ erroris intervenientis, coram nobis in Hiberniâ venire fecimus, et judicium inde reversatum est, ut dicitur, error intervenit manifestus, ad grave damnum ipsius Alexandri, sicut ex querelâ suâ accepimus: Nos error, si quis fuit, modo debito corrigi, et partibus prædictis plenam et celerem justiciam fieri, volentes in hac parte, vobis mandamus quod si judicium inde redditum et reversatum sit, tunc recordum et processum prædict' cum omnibus ea tangentibus, nobis sub sigillo vestro distincte et aperte mittatis, et hoc breve; Ita quod ea habeamus in octabis purificationis beatæ Mariæ, ubicunque tunc fuerimus in Angliâ, ut inspectis recordo et processu prædict' ulterius inde pro errore illo corrigendo fieri faciemus, quod de jure fuerit faciendum. Et scire facito præfato Thomæ quod tunc sit ibi ad procedendum in loquelâ prædictâ, et ad faciendum et recipiendum quod curia nostra consideret in præmissis. Teste meipso apud Westmonasterium duodecimo die Januarii, anno regni nostri septimo.

Allocatur

Woodward.

R. Pyne.

Recordum et processum loquelæ, unde infra fit mentio, cum omnibus ea tangentibus, coram dominâ reginâ, ubicunque, &c. ad diem et locum infracontent' mitto, in quodam recordo huic brevi annexo; et scire feci infra nominato Thomæ quod tunc sit ibi ad procedendum in loquelâ prædictâ, prout interius mihi præcipitur.

Retorne de
breve d'error.

Sic respondeo.

R. Pyne.

PLACITA coram dominâ reginâ apud the King's courts, de termino sancti Michaelis, anno regni dominæ nostræ Annæ, Dei gratiâ magnæ Britanniæ, Franciæ, et Hiberniæ reginæ, fidei defensoris, &c. sexto.

Placita.

Teste Ricardo Pyne milite.

Savage.

Domina regina mandavit dilecto et fideli suo Roberto Doyne armigero, breve suum clausum in hæc verba; sc. Anna Dei gratiâ magnæ Britanniæ, Franciæ, et Hiberniæ regina, fidei defensor, &c. Dilecto et fideli nostro Roberto Doyne armigero, salutem: Quia in recordo et processu, ac etiam in redditione judicii, loquelâ quæ fuit in curiâ domini Willielmi tertii, nuper regis An-

Breve de er-
ror hors B. R.
al C. B. in
Hiberniâ.

glia Scotiae Franciae et Hiberniae, coram dilecto et fidele nostro Roberto Cox milite, nuper capitali justiciario dicti nuper regis de communi banco regni sui Hiberniae, et sociis suis justiciariis de communi banco praedicto, per breve de forma donationis en le discender, inter Alexandrum George petentem et Thomam Veasey barronettum, tenentem, de uno messuagio et uno gardino cum pertinentibus, scituat' jacent' et existent' in villa villato sive hamleto de Maryburrogh in comitatu reginae, et septuagintis duabus acris terrae arabilis, octo acris pasturae, septendecim acris bosci et subbosci, et septendecim acris morae aquosae, cum pertinentibus, in villa villato sive hamleto de Tower, alias Togher, et campis ejusdem, cum pertinentibus, in comitatu praedicto, ut dicitur, error intervenit manifestus, ad grave damnum ipsius Alexandri George, sicut ex querela sua accepimus: Nos error, si quis fuit, modo debito corrigi, et eidem Alexandro George, plenam et celerem justiciam fieri, volentes in hac parte, vobis mandamus, quod si judicium inde redditum sit, tunc recordum et processum loquela praedictae, cum omnibus ea tangentibus, nobis sub sigillo vestro distincte et aperte mittatis, et hoc breve; Ita quod ea habeamus coram nobis a die Sanctae Trinitatis, in tres septimanas, ubicunque tunc fuerimus in Hibernia, ut inspectis recordo et processu praedicti, ulterius inde pro errore illo corrigendo fieri faciemus, quod de jure et secundum legem et consuetudinem regni nostri Hiberniae fuerit faciendum. Testibus reverendo in Christo patre, ac consiliario nostro, Narcisso archiepiscopo Armahensis, primato et metropolitano totius Hiberniae, et praedilecto et fidele consiliario nostro Ricardo Cox, milite et barronetto, cancellario nostro Hiberniae, Justiciariis et generalibus gubernatoribus nostris regni nostri Hiberniae, apud the King's courts, vicesimo tertio die Junii, anno regni nostri sexto. Carr.

Examinatur per Carr.

Allocatur Roberto Doyne.

Retorne de
ceo.

Virtute istius brevis mihi directi, recordum et processum loquela, unde infra fit mentio, cum omnibus ea tangentibus, serenissimae dominae reginae humillime mitto, prout istud breve in se exigit et requirit.

Robertus Doyne.

Placita.

PLACITA apud the King's courts, coram Ricardo Cox milite et sociis suis justiciariis dominae Annae, Dei gratia Angliae Scotiae Franciae et Hiberniae reginae, fidei defensoris, &c. de banco suo regni sui Hiberniae, de termino Paschae, anno regni sui secundi, rotulo 67.

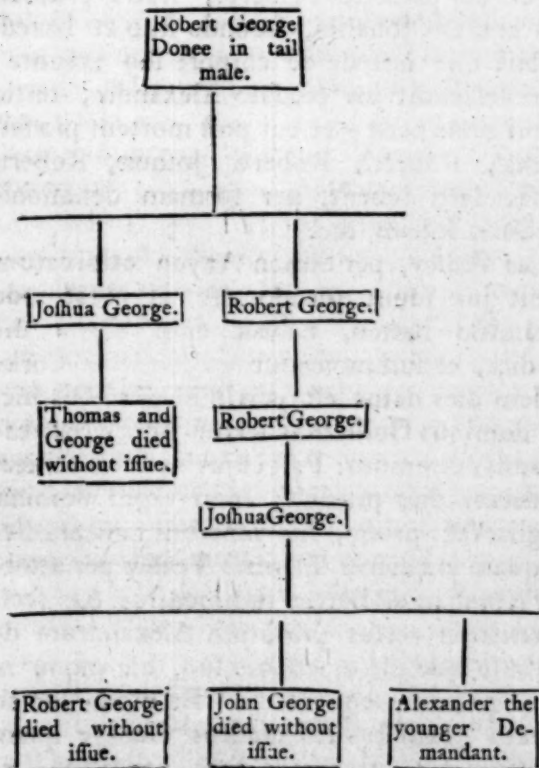
Barry.

ALIAS prout patet termino sancti Michaelis, anno regni dominae Annae, nunc reginae Angliae &c. primo, rotulo 106. continetur sic: Alias prout patet termino Paschae, anno regni dominae

minæ Annæ, nunc reginæ Angliæ, &c. primo, rotulo 74. continetur sic: Alias prout patet termino sancti Michaelis, anno regni domini Gulielmi tertii, nuper regis Angliæ, &c. decimo tertio, rotulo 107. continetur sic: Comitatus reginæ fs. Alexandrus George per Robertum Poole attornatum suum petit versus Thomam Veasey barronetum, unum messuagium et unum gardinum, cum pertinentibus, scituat' jacent' et existent' in villâ villato five hamleto de Maryburrogh, in comitatu prædicto, et 72 acras terræ arabilis, 8 acras pasturæ, 17 acras bosci et subbosci, et 17 acras moræ aquosæ, in villâ villato five hamleto de Tower alias Togher et campis ejusdem, cum pertinentibus, in comitatu prædicto: quæ domina Elizabeth, nuper regina Angliæ Franciæ et Hiberniæ, dedit Roberto George, et hæredibus masculinis

Narratio en nature d'un brief de formidon. Quas to the form of the writ part. Vide F.N.B. 211, 12.

Le titre del demandt.



de corpore suo legitime procreandis; quæque, post mortem prædicti Roberti George; et Joshuæ George, filii et hæredis ejusdem Roberti George; et Thomæ George, filii et hæredis ejusdem Joshuæ; et Roberti George, filii Roberti secundi filii Roberti George senioris, consanguinei et hæredis ejusdem Thomæ George, qui quidem Thomas George obiit sine hærede de corpore suo; et Joshuæ George, filii et hæredis ejusdem Roberti George, filii et hæredis prædicti Roberti secundi filii prædicti Roberti George senioris; et Roberti George, filii senioris et hæredis ejusdem Joshuæ; et Johannis George, secundi filii ejusdem Joshuæ, et fratris et hæredis prædicti Roberti, filii senioris et hæredis prædicti Joshuæ; qui quidem Robertus et Johannes, filii prædicti Joshuæ, obierunt sine hærede de corporibus suis: præfato Alexandro George modo petenti, tertio filio prædicti Joshuæ, descendere debent, per formam donationis prædictæ. Et unde dicit quod prædicta domina Elizabeth regina dedit tenementa prædicta, cum pertinentibus, præfato Roberto George seniori, et hæredibus de corpore suo exeuntibus; per quam donationem idem Robertus George senior, fuit seifitus de terris et tenementis prædictis, in dominico suo ut de

de corpore suo legitime procreandis; quæque, post mortem prædicti Roberti George; et Joshuæ George, filii et hæredis ejusdem Roberti George; et Thomæ George, filii et hæredis ejusdem Joshuæ; et Roberti George, filii Roberti secundi filii Roberti George senioris, consanguinei et hæredis ejusdem Thomæ George, qui quidem Thomas George obiit sine hærede de corpore suo; et Joshuæ George, filii et hæredis ejusdem Roberti George, filii et hæredis prædicti Roberti secundi filii prædicti Roberti George senioris; et Roberti George, filii

feodo-talliato et jure, per formam donationis prædictæ, tempore pacis, tempore Caroli secundi nuper regis, viz. infra 40 annos jam ultimos elapsos, capiendo inde expletia ad valentiam, &c. Et de ipso Roberto George seniore descendit jus præfato Joshuæ, filio et hæredi prædicti Roberti; et de prædicto Joshuâ descendit jus præfato Thomæ, filio et hæredi prædicti Joshuæ; et de præfato Thoma, eo quod prædictus Thomas obiit sine hærede de corpore suo exeunte, descendit jus præfato Roberto, filio et hæredi Roberti secundi filii Roberti George senioris et fratris prædicti Joshuæ, et consanguineo masculino et hæredi ejusdem Thomæ: De prædicto Roberto descendit jus præfato Joshuæ, filio et hæredi prædicti Roberti; et de prædicto Joshuâ descendit jus præfato Roberto, filio et hæredi prædicti Joshuæ, qui obiit sine hærede de corpore suo exeunte; et de prædicto Roberto, fratre prædicti Johannis, descendit jus præfato Johanni, secundo filio et hæredi prædicti Joshuæ, qui obiit sine hærede de corpore suo exeunte: Et de prædicto Johanne descendit jus præfato Alexandro, tertio filio prædicti Joshuæ, qui nunc petit; et cui post mortem præfati Roberti, Joshuæ, Thomæ, Roberti, Roberti, Joshuæ, Roberti et Johannis, modo descendere debent, per formam donationis prædictæ: Et unde producit sectam, &c.

Tenant appears and vouches Abraham Batten.

Mort de Roy.

Batten effoins, and hath day till crastino animarum.

Then appears and enters into the warranty gratis.

Demandant declares anew against the tenant by warranty.

Et prædictus Thomas Veasey, per Simon Anyon attornatum suum, venit et defendit jus suum quando, &c. et vocat inde ad warrantiam Abrahamum Batten, habeat eum hic a die Paschæ in quindecim dies, et summoneatur in comitatu Corke per auxilium curiæ; Idem dies datus est partibus prædictis hic, &c. Ante quem diem dominus Gullelmus tertius nuper rex Angliæ &c. diem suum clausit extremum: Post cujus mortem scilicet a die Paschæ in quindecim dies prædicti, anno regni dominæ Annæ nunc reginæ Angliæ &c. primo, hic venerunt tam prædictus Alexandrus George quam prædictus Thomas Veasey per attornatos suos prædictos; et Abrahamus Batten summonitus, &c. fecit se effoniari de malo veniendi versus præfatum Alexandrum de prædicto placito, et habuit inde diem, effonio suo, hic usque in crastinum animarum tunc proxime sequentem. Et modo hic ad hunc diem venerunt tam prædictus Alexandrus George quam prædictus Thomas Veasey, per attornatos suos prædictos; et prædictus Abrahamus Batten, summonitus &c. per prædictum Simon Anyon attornatum suum similiter venit, et gratis tenementa prædicta, cum pertinentibus, eidem Thomæ Veasey warrantizavit, &c. Et prædictus Alexandrus George petit versus ipsum Abrahamum, tenentem per warrantiam suam, tenementa prædicta cum pertinentibus in formâ prædictâ, &c. Et unde dicit quod prædicta domina Elizabeth regina dedit tenementa prædicta, cum pertinentibus, præfato Roberto George seniori, et hæredibus de corpore suo exeuntibus; per quam donationem idem Robertus George senior fuit seiscitus de terris et tenementis prædictis, cum pertinentibus, in dominio suo ut de feodo

feodo talliato et jure, per formam donationis prædictæ, tempore pacis, tempore domini Caroli secundi nuper regis, viz. infra 40 annos jam ultimos elapsos, capiendo inde expletia ad valentiam, &c.: et de ipso Roberto George seniore descendit jus præfatum Joshuæ, filio et hæredi prædicti Roberti; et de prædicto Joshuâ descendit jus præfatum Thomæ, filio et hæredi dicti Joshuæ; et de prædicto Thomâ, eo quod prædictus Thomas obiit sine hærede de corpore suo exeunte, descendit jus præfatum Roberto, filio et hæredi prædicti Roberti secundi filii Roberti senioris, et fratris prædicti Joshuæ, et consanguineo masculino et hæredi ejusdem Thomæ: De prædicto Roberto descendit jus præfatum Joshuæ, filio et hæredi prædicti Roberti; et de prædicto Joshuâ descendit jus præfatum Roberto, filio et hæredi prædicti Joshuæ, qui obiit sine hærede de corpore suo exeunte; et de prædicto Roberto fratre prædicti Johannis descendit jus præfatum Johanni, secundo filio prædicti Joshuæ, qui obiit sine hærede de corpore suo exeunte; et de prædicto Johanne descendit jus præfatum Alexandro, tertio filio prædicti Joshuæ, qui nunc petit; et cui post mortem præfati Roberti, Joshuæ, Thomæ, Roberti, Roberti, Joshuæ, Roberti, et Johannis, præfatum Alexandro modo petenti descendere debent, per formam donationis prædictæ, ut dicit, &c. Et prædictus Abrahamus Batten, tenens per warrantiam, defendit jus suum quando, &c. et ulterius vocat inde ad warrantiam Hugonem Harding generosum, habeat eum hic a die Paschæ in quindecim dies, anno secundo dominæ Annæ reginæ, et summonetur in comitatu Corke per auxilium curiæ, &c. Idem dies datus est tam prædicto Alexandro George quam prædicto Abrahamo Batten, tenenti per warrantiam suam, hic, &c. Ad quem diem hic venerunt tam prædictus Alexander George quam prædictus Abrahamus Batten, tenens per warrantiam suam prædictam, per attornatos suos prædictos; et prædictus Hugo Harding summonitus, &c. fecit se effonari de malo veniendi versus præfatum Alexandrum de prædicto placito, et habuit inde diem, per effonium suum, hic usque crastinum animarum tunc proxime sequentem. Et modo hic ad hunc diem venerunt tam prædictus Alexandrus quam prædictus Abrahamus, tenens per warrantiam suam, per attornatos suos prædictos; et prædictus Hugo Harding non venit sed defaultum fecit: super quo prædictus Alexandrus per attornatum suum prædictum petit seisinam tenementorum prædict', cum pertinentibus, per defaultum prædictum sibi adjudicari, &c. Ideo consideratum est quod capiatur in manus dominæ reginæ de terris prædicti Hugonis Harding ad valentiam, &c. et unde, &c. et diem, &c. Et quod idem Hugo summonetur quod esset hic, a die Paschæ in quindecim dies tunc proxime sequente, inde responsurus et ostensurus quare non servavit diem sibi datam per effonium suum hic in curiâ, postquam summonitus fuit; Idem dies datus est partibus prædictis hic, &c. Ad quem diem hic venerunt tam prædictus Alexandrus quam prædictus Thomas Veasey, et Abrahamus Batten per attornatos

Batten vouches over Hugh Harding.

Harding casts his effoin, and hath day till crastino animarum.

At which day Harding made deft.

And demant. prays seisin.

Grand cape v. Harding; and he to appear, &c. a die Paschæ in 15 days.

The sheriff
returns that
Harding was
dead.

Tenant by
warranty
summoned to
appear to re-
vouch, &c.

He appears,
and calls an
essoyn in quin-
denis Paschæ.

And at the
day he and
Veasey ap-
pear, but the
demandant
makes de-
fault, upon
which judg-
ment is giv-
en, that he
and his pled-
ges be in mer-
cy, and that
Batten and
Veasey go
thereof, with-
out day.

Error assign-
ed in the
Queen's
Bench in Ire-
land.

1st Error.

2d Error.

suos prædictos. Et vicecomes comitatus reginæ modo mandavit, quod prædictus Hugo Harding ante diem emanationis istius brevis, scilicet vicesimo die Septembris anno regni dominæ Annæ reginæ secundo, moriebatur; et quia prædictus Alexandrus hoc non dedit, præceptum est vicecomiti comitatus Corke quod resummoneat per bonos summonitores prædictum Abrahamum Batten, tenentem per warrantiam suam, quod sit coram justiciariis dictæ dominæ reginæ hic, scilicet apud the king's courts, in crastino animarum, auditurus recordum et processum loquelæ prædictæ, nec non ad revocandum ad warrantiam, si voluit; ita quod loquelæ prædictæ tunc sit in eodem statu, quo fuit, in dictâ curiâ, in crastino animarum anno regni dictæ dominæ reginæ nunc primo, quâ die prædictus Abrahamus Batten in curiâ hic comperuit, et gratis tenementa prædicta, cum pertinentibus, eidem Thomæ Veasey warrantizavit; et postea, loquelâ prædictâ remanente sine die per mortem prædicti Hugonis in formâ prædictâ, &c. idem dies datus est tam prædicto Alexandro quam prædicto Thomæ Veasey et Abrahamo hic, &c. Ad quem diem hic venerunt tam prædictus Alexandrus quam prædictus Thomas Veasey per attornatos suos prædictos, et prædictus Abrahamus Batten resummonitus, &c. fecit se essoniari de malo veniendi versus prædictum Alexandrum de prædicto placito, et habuit inde diem per essonium suum hic usque a die Paschæ in quindecim dies tunc proxime sequent'. Et modo hic ad hunc diem venerunt tam prædictus Thomas Veasey, per attornatum suum prædictum, quam prædictus Abrahamus Batten, per prædictum Simon Anyon attornatum suum, et prædictus Abrahamus Batten gratis tenementa prædicta, cum pertinentibus, eidem Thomæ Veasey warrantizavit. Et super hoc prædictus Alexandrus George, licet solemniter exactus, non venit, nec est prosecutus breve suum prædictum; ideo ipse et plegii sui de proseguendo sunt inde in misericordiâ, &c. querentis nomina plegium, &c. et quod prædictus Abrahamus Batten et prædictus Thomas Veasey, eant inde sine die, &c.

Examinatus per Barry.

ET postea scilicet die Martis proxime post crastinum animarum, coram dominâ reginâ, venit prædictus Alexandrus George per Johannem Caldwell attornatum suum, et idem Alexandrus dicit quod in recordo et processu, ac etiam in redditione judicii prædicti manifestus est error, in hoc scilicet, quod ubi iudicium redditum est quod ipse Alexandrus et plegii sui sunt inde in misericordiâ, prædictum iudicium reddi debuisset quod idem Alexandrus recuperet seisinam de terris et tenementis prædictis: Insuper in hoc erratum est, quod per recordum prædictum apparet quod unum breve de resummons adjudicatum est versus Abrahamum

mum Batten *le vouchee* in recordo prædicto nominatum, quando debuisset vocari, vel ad respondendum ad narrationem prædicti Alexandri, vel statim revocare ad warrantiam: Insuper in hoc ^{3d Error.} erratum est, quod nullum capias ad valentiam adjudicatum est vicecomiti comitatus, sed tantum unum iudicium quod erit unum capias: Insuper erratum est in hoc, quod vicecomes comitatus ^{4th Error.} per recordum modo mandavit, quod præfatus Hugo Harding ante diem emanationis hujus brevis moriebatur, et non dicitur vicecomes comitatus reginæ modo mandavit, *breve prædictum sibi inde directum et retornatum*, quod ante diem exhibitionis brevis prædicti præfatus Hugo Harding moriebatur: Insuper in hoc ^{5th Error.} erratum est, quod in redditione iudicii prædicti dicitur, quod prædictus Alexandrus et plegii sui de prosequendo sunt inde in misericordiâ; et non dicitur, *ideo consideratum est per curiam* quod prædictus Alexandrus et plegii sui de prosequendo sunt inde in misericordiâ; et iudicium prædictum debuit esse quod prædictus Alexandrus nil capiat per billam: Denique erratum existit in hoc, ^{6th Error.} quod ubi in iudicio prædicto dicitur, quod prædictus Abrahamus Batten et prædictus Thomas Veasey eant inde sine die; debuit esse tantum quod prædictus Thomas Veasey *le tenant* eat inde sine die. Et petit idem Alexandrus breve dominæ reginæ ad premuniendum prædictum Thomam Veasey et Abrahamum Batten essend' coram dominâ reginâ auditur' recordum et processum prædict'.

Et prædictus Thomas Veasey, per Loftum Mischamp attornatum suum, venit et dicit quod nec in recordo et processu prædictis nec in redditione iudicii prædicti in ullo est erratum: Et petit quod curia hic procedat ad examinandum tam recordum et processum prædict', quam materiam prædictam superius pro errore assignatam; et quod iudicium prædictum in omnibus affirmetur, &c. Et quia curia dictæ dominæ reginæ hic de iudicio suo de et super premissis reddendo nondum advisatur dies datus est partibus prædictis coram dictâ dominâ reginâ usque in octabas sancti Hilarii ubicunque, &c. iudicium suum de et super premissis audiend', eo quod curia dictæ dominæ reginæ hic inde nondum, &c. Ad quem diem coram dominâ reginâ apud the king's courts venerunt partes prædicti, per attornatos suos prædictos: Et quia curia dictæ dominæ reginæ de iudicio suo de et super premissis reddendo nondum advisatur, dies ulterius inde datus est partibus prædictis coram dictâ dominâ reginâ usque in quindenae Paschæ ubicunque, &c. iudicium suum de et super premissis audiend', eo quod curia dictæ dominæ reginæ hic inde nondum, &c. Ad quem diem coram dictâ dominâ reginâ apud the king's courts venerunt partes prædicti, per attornatos suos prædictos: super quo visis premissis, et per curiam dictæ dominæ reginæ hic diligenter examinatis, et plene intellectis tam recordo et processu prædictis ac iudicio super eisdem reddito quam prædictis causis pro

Tenant appears, and pleads 'no error.'

Dies datus.

Dies alterius datus.

Judgment
quod judi-
cium prædic-
tum reverse-
tur.

pro errore per prædictum Alexandrum George superius assignatis et allegatis, maturâque deliberatione inde habitâ, consideratum est, quod judicium prædictum ob erroribus prædictis, et aliis in recordo et processu prædictis existentibus, vacaretur et nullius effectus in lege existat; quodque judicium prædictum reversetur, annulletur, et penitus pro nullo habeatur, &c.

Paschæ nono Annæ.

New error
brought by
demandant
in B. R. at
Westminster.

Assignment
of errors.

POSTEA scilicet die Veneris proxime post crastinum Sanctæ Trinitatis isto eodem termino, coram dominâ reginâ apud Westmonasterium venit prædictus Alexander, per Carolum Sanderfon attornatum suum; et statim dicit, quod in recordo et processu prædicti, acetiam in redditione judicii reversationis prædicti, manifeste est erratum; viz. in hoc, quod judicium prædictum superius primo redditum solummodo reversatum fuit per eandem curiam de banco reginæ in Hiberniâ, ob errores illos in recordo et processu illis, ubi insuper per eandem curiam judicium reddi debuisset, quod idem Alexander recuperet seisinam suam versus præfatum Thomam de tenementis prædictis; et ideo manifeste est erratum in reddendo judicium prædictum. Et idem Alexander petit quod judicium illud reversetur ob errorem illum; et quod ipse ea omnia, quæ occasione defectus in judicio prædicto non habuit sed amisit, modo recuperet, et adinde restituatur; ac quod præfatus Thomas ad errorem prædictam rejungat, et quod curia dictæ dominæ reginæ hic procedat ad examinationem tam recordi et processus prædicti, quam erroris prædicti per ipsum Alexandrum in curiâ hic superius assignati.

W. Salkeld.

Trinitatis nono Annæ.

Tenant ap-
pears, and
pleads.

ET prædictus Thomas, per Henricum Dodd attornatum suum, venit et dicit, quod nec in recordo et processu prædicti, nec in redditione judicii reversationis prædicti, in ullo est erratum: Et similiter petit quod curia dominæ reginæ hic procedat ad examinandum tam recordum et processum prædicti, quam materiam prædictam superius pro errore assignatam, et quod judicium prædictum in omnibus affirmetur. Et quia curia dictæ dominæ reginæ hic de judicio suo de et super præmissis reddendo nondum advisatur, dies inde datus est partibus prædictis, coram dictâ dominâ reginâ, usque a die sancti Michaelis in tres septimanas, ubicunque, &c. de judicio suo de et super præmissis audiendo, eo quod curia dictæ dominæ reginæ hic inde nondum, &c.

Rob. Raymond.

In

In the above record, there is mention made of a writ of summons, re-summons, and *parvum cape*; therefore here follows the forms of these writs, and of a grand cape, called *magnum cape*.

ANNA, &c. Vicecomiti comitatus, &c. salutem: Summo- Breve de
summons.
neas per bonos summonitores Abrahamum Batten, quod sit coram
justiciariis nostris apud, &c. ad warrantizandum Thomæ Veasey,
duo tenementa cum pertinentibus in comitatu, &c. quæ Alex-
andrus George clamat ut jus suum versus eum, et unde idem
Thomas Veasey vocat prædictum Abrahamum Batten ad warran-
tizandum versus eum; et habeas summonitores, et hoc breve.
Teste, &c.

ANNA, &c. Quia Alexandrus George in curiâ nostrâ coram Resummons.
justiciariis nostris apud, &c. securitatem invenit de clamore
suo prosequendo per Johannem Doe et Ricardum Roe, tibi præ-
cipimus, sicut alias tibi preceperimus, quod summoneas per bo-
nos summonitores Abrahamum Batten, quod sit coram justiciariis
nostris apud, &c. [â die Paschæ in quindecim dies, *respon-*
surus prædicto Alexandro George in loquelâ prædictâ, et ostensus
quare non servavit diem sibi datum per essoniam suam in dictâ curiâ
nostrâ in crastino, &c. postquam summonitus fuit] in crastino ani-
marum, auditurus recordum et processum loquelæ prædictæ nec
non ad revocandum ad warrantiam, si voluit; ita quod loquela
prædicta tunc sit in eodem statu quo fuit in crastino anima-
rum anno regni nostri primo, quâ die prædictus Abrahamus
Batten in curiâ nostrâ prædictâ comperuit, et gratis tenementa
cum pertinentibus in comitatu, &c. quæ præfatus Alexandrus
clamat ut jus suum versus quendam Thomam Veasey, eidem Tho-
mæ Veasey warrantizavit; et postea, loquelâ prædictâ remanente
sine die per mortem cujusdam Hugonis Harding, quem prædic-
tus Abrahamus Batten ulterius vocavit ad warrantizandum tene-
menta prædicta versus præfatum Alexandrum George: Et habeas
ibi tunc summonitores et hoc breve. Teste, &c.

This would
be proper a-
gainst Har-
ding. (Vide
the record.)
Aliter v.
Batten.

ANNA, &c. Vicecomiti, &c. salutem: Cape in manus nos- Parvum cape
ad valentiam.
Vide Bract.
371. 386.
tras Hugonis Harding, per defectum ipsius Hugonis, ad valentiam
duorum tenementorum cum pertinentibus in comitatu, &c. quæ
Alexandrus George in curiâ nostrâ coram justiciariis nostris apud
&c. clamat ut jus suum versus Thomam Veasey, et unde idem
Thomas in eadem curiâ nostrâ vocavit Abrahamum Batten ad
warrantizandum versus eum; qui quidem Abrahamus in eadem
curiâ nostrâ ulterius vocat præfatum Hugonem, ad warrantizandum
versus prædictum Alexandrum, pro defectu ipsius Hugonis. Et
summoneas per bonos summonitores prædictum Hugonem quod

fit coram iusticiariis nostris apud &c. a die Paschæ in quindecim dies responsurus præfato Alexandro loquelâ prædictâ et ostensus quare non servavit diem sibi datam per effonium suum in dictâ curiâ nostrâ, in crastino, &c. postquam summonitus fuit: Et habeas ibi summonitores et hoc breve. Teste, &c.

Magnum
cape ad va-
lentiam.
Bract. 365,
370, 384,
386.

Vide Regist.
Judic. fo. 1,
2, 3, &c.

Aliter in iti-
nere. Vide
when these
writs are
granted, and
the conse-
quences, &c.
thereof.
Co. Lit. 101,
b. 102. a.

ANNA, &c. Vicecomiti, &c. salutem: Cape in manus nostras, per visum legalium hominum de comitatu tuo, terra Hugonis Harding, per defectum ipsius Hugonis, ad valentiam duorum tenementorum cum pertinentibus in, &c. quæ Alexandrus George [ut supra in the parvum cape, till ad warrantizandum versus prædictum Alexandrum.] Et diem captionis scire facias iusticiariis nostris apud &c. per literas tuas sigillatas; et summeas per bonos summonitores prædictum Hugonem quod sit coram præfatis iusticiariis nostris apud &c. inde responsurus et ostensus [ut supra] et habeas ibi nomina eorum per quorum visum hoc feceris, summonitores, et hoc breve. Teste, &c.

(a) CAPE, &c. de terrâ Hugonis Harding, per defectum ipsius Hugonis, ad valentiam, &c. cum pertinentibus in comitatu, &c. quæ A. in curiâ nostrâ coram iusticiariis nostris itinerantibus apud &c. clamat ut jus suum versus Thomam Veasey, et unde, &c. et habeas ibi, &c.

C A S E.

This was a *formedon* brought in the Common Pleas in *Ireland*, where judgment was given for the tenant. The demandant brought a writ of error in the Queen's Bench there, and upon that the judgment of C. B. was reversed. Now he brings a writ of error here, complaining that the Queen's Bench in *Ireland* should not barely have reversed the first judgment; but should have given him judgment to recover the lands themselves. And so, by his writ of error here, he prays that judgment now, which the Queen's Bench in *Ireland* should have given him before.

The case was argued by Mr. Serjeant *Weld* and Mr. *Salkeld* for the demandant, to maintain the writ of error; and by Sir Robert *Raymond*, Solicitor-general, and Mr. *Lutwyche* for the tenant, against the writ of error.

Mr. *Salkeld* spoke to this effect:—The original action was a *formedon in descender*, brought by one *Alexander George* against one *Thomas Veasey*, in *Ireland*; wherein *Alexander George* demanded

(a) A *magnum* cape and a *parvum* cape vary from the above (which are *ad valentiam*) chiefly in saying, 'Cape, &c.' [the premisses demanded themselves] with an 'Et testatum est in eadem curiâ, quod prædictus Hugo tenuit prædicta tenementa [on such a day]:' and in the latter, 'ad audiendum or auditorum inde iudicium suum,' instead of, 'responsurus quare, &c.'

a messuage and several acres of ground in the Queen's county, as heir male to one *Robert George*, to whom queen *Elizabeth*, by her letters patent, gave the same; *habendum* to him and the heirs male of his body.

Veasey venit & defendit jus suum, and vouches to warranty one *Abraham Batten*; and has day to bring him in, by summons returnable *quinden' Paschæ*.

At that day the tenant and demandant appear; but the vouchee *fecit se effoniari de malo veniendi*; and so a new day is given to *crastin' animarum*.

In *crastino animarum* come the demandant and tenant, and also the vouchee, who enters into warranty *gratis*: The demandant counts against him, and he makes defence, and vouches over one *Hugh Harding*, and has to *quinden' Paschæ* to bring him in; with a summons to the sheriff of the county of *Cork*: And the same day is given to the demandant and the first vouchee.

At that day, the demandant and first vouchee appear; but the second vouchee is effoined on the common effoin; and a new day is given to *crastin' animarum*.

In *crastino animarum* the demandant and first vouchee appear; but *Harding*, the second vouchee, *non venit sed defaultum fecit*.

Upon which the demandant prays seisin of the lands, and the court award a *grand cape*, returnable *quinden' Paschæ*, against *Harding*; and the same day is given to the parties.

At that day the demandant, tenant, and first vouchee appear; and the sheriff of the Queen's county returns that *Harding* is dead: Upon this, the court award a resummons to summon in the first vouchee, returnable in *crastino animarum*, that he may revouch at large, if he please; *et idem dies datus est tam prædicto Alexandro quam præfato Thomæ & Abrahamo*.

Crastino animarum come the demandant and tenant; but *Batten* casts the common effoin, and has a new day given him, *ad quinden' Paschæ*: But there is no *idem dies* to the other parties.

Crastino animarum come the tenant and first vouchee; and the latter *gratis* enters into warranty; *et super hoc prædictus Alexandrus George, licet solemniter exactus, non venit, nec ulterius prosecutus est breve suum prædictum; ideo ipse & plegii sui de proseguendo sunt inde in misericordiâ; et tam prædictus Abrahamus Batten quam prædictus Thomas Veasey, eant inde sine diē*.

This judgment so given in *C. B.* was reversed in *B. R.*; but the judgment of *B. R.* was only *quod reversetur*: Whereas we most humbly insist that it should have been, *et quod prædictus Alexandrus recuperet seisinam*.

The judgment in the Common Pleas being for the tenant, the judgment in *B. R.* which is only *quod judicium prædictum reversetur* is no judgment. *Phillips v. Bury, Mich. 10 W. B. R.* And that judgment being nought, because they should have given the judgment which the *C. B.* there should have
I given;

given; this court is now to give a proper judgment. Vide a case, but not cited by him, in 1 *Leo.* 33.

Therefore the question will be, what judgment the Common Pleas in *Ireland* should have given; for this court is now to do what they should have done: And all depends on the record, as it stood in *C. B.* If that court should have given final judgment *pro petente*, so must this; if a grand cape, so must this; if a petit cape, so must this: If but a summons, so must this court.

I shall begin with the process against the second vouchee *Hugh Harding*.

Resp. of Mr.
Sol. gen.
If no day gi-
ven to the
demandant,
then all is
discontinued.
Co. Entr. 252.

Harding then, being vouched by *Abrabam Batten*, [who is become tenant to the warranty, and has a summons *per auxilium curiæ* into the county of *Cork*;] is returned summoned, and casts an essoin *de malo veniendi*, and has a new day, and then makes default; and then there is a grand cape, and on the return of that, the demandant and the tenant appear, and the return is a return by the sheriff of the *Queen's* county, who returns *quod prædictus Hugo ante emanationem istius brevis moriebatur*; and thereupon a return is awarded against *Batten*, the tenant by warranty, to revouch *si voluit*.

Supposing this to be a return, of which the court takes notice, we will consider the tenant by warranty; 1st, As *in* court; and 2dly, As *out* of court.

By the entry on the roll, *Abrabam Batten*, on the return of the grand cape, is supposed to be actually *in* court: By the act of the court, in awarding a return *ad revocandum*, he is supposed to be *out* of court.

E contra it
was said by
Mr. Sol. gen.
that the first
vouchee had
made no de-
fault; that
he had a day,
by the essoin,
and appear-
ed; conse-
quently be-
ing in court,
no petit cape
could be awarded against him. Vide *Mich.* 8 E. 3. pl. 7.

To consider it either way; If the tenant by warranty was *out* of court, at the return of the grand cape, there shall be a petit cape against him, and not a return; for the vouchee of the tenant by warranty is no party in court, till he appear and enter into warranty; so that the court hath nothing to do with him, but with his voucher the tenant by warranty. And his non-appearance, at the return of the grand cape, was a default; and when there is a default before appearance, the process is a grand cape: Where after appearance a petit cape (a). 1 *Inst.* 101. b. 1 *Lev.* 105. *Slaughter v. Tucker*.

(a) This is to be understood of a default in a different term from that in which the tenant appeared; for if he make default in the same term in which he appears, judgment peremptory shall be given, for the demandant to recover seisin. 2 *Saund.* 46.

The grand cape is to seise the lands for the default, and to summon the party to shew cause, why he did not appear according to the summons. The petit cape is to seise the lands, and summon the party to be in court to hear judgment. *Officin. Brev.* 107, 108.

The case in *Dy. 24. b.* is in this case in point. In *formedon* the tenant vouches; the vouchee, on the return of the summons, is effoined, and has a day *per effonium*; at that day, neither tenant nor vouchee appeared: *Et per cur'*, A petit cape shall go against the tenants, for they have nothing to do with the vouchee, till he comes into court and enters into the warranty.

Supposing the tenant by warranty to be *in* court on the return of the grand cape, what occasion could there be for the resummons? A resummons to fetch one into court, that *was* in court, is repugnant in itself. 2 *Saund.* 49.

But say they, the record was discontinued by the death of the vouchee.

'Tis true, a resummons lies, where a cause is *fine die*, or discontinued: But here is no discontinuance. At this time the demandant *Alexander George* and *Abrabam Batten* were the parties in court, and the only parties; *Veasey* was out of court, by *Batten's* entering into the warranty. So is *Hob.* 47. As soon as the vouchee has entered into the warranty, the tenant is out of court. *Co. Ent.* 322. The tenant can't plead, nor be heard in court. If *Abrabam Batten* die, the tenant can't shew it to the court.

On the other side, *Harding* is not become a party, because he has not appeared; he has indeed effoined, but an effoin is an excuse for not appearing, and therefore is not an appearance. What then doth his death signify? Why it abates the voucher. 2 *Ro. Rep.* 767. But it makes no alteration in the original action; and accordingly 'tis held, 23 *Aff. pl.* 15. that the vouchee is no party to the action, by the effoin; *car nul bome forsque le tenant est party tanque le vouchee ait garr.* and so is *Dy. 24. b.* The court has nothing to do with the vouchee, till he appear and enter into the warranty.

Obj. If a resummons should not have issued, what should the court have done? *Answ.* That depended on these considerations; 1st, Was the party in court under a duty to answer? Or 2dly, Was the court, in duty, to call on him to answer?

Here is the tenant by warranty, whose voucher is abated. I don't deny but he may shew the death of the first tenant, or revouch; but the question is, whether he ought to revouch of himself, or be called to it by the court: For if he was under a duty to plead, and do not, it is a *nil dicit*; and the court should have entered a *nil dicit*, and given judgment thereon.

A voucher is a very great indulgence to the tenant, and a very great hardship to the demandant. The tenant has it allowed him, in safeguard of his warranty, that he may have the benefit of it, without circuitry of action: But as to the demandant, 'tis dilatory; and therefore the tenant must pursue it fairly.

The books say 'tis in lieu of an action: But a voucher may as properly be said to be an intermediate action, wherein he that vouches is demandant or plaintiff, and the vouchee is tenant or defendant. It has all the qualities of an action: The vouchee as a defendant may plead; the voucher itself may abate: And till this voucher be determined, the original action is at a stay.

Now the voucher in this case is determined; for the death of the vouchee is an actual abatement of it. The consequence is, that the right of the demandant to judgment immediately accrues; and unless the tenant by warranty interpose himself, and offer something further to the court, the court are to give judgment for the demandant: For now the voucher, which was the impediment, is removed, and therefore the tenant by warranty should have interposed anew by plea or revoucher; for as it is said by *Vavasor*, in the 8 H. 7. fol. 7. a voucher, as to the original demandant, is in lieu of a bar; and if *that* be over-ruled, judgment peremptory shall be given for the demandant: And if the tenant vouch and shew his cause of voucher, and that prove insufficient, judgment final shall be given; for it is peremptory, if there be an adjournment. Since then it is a kind of bar as to the demandant, tho' the voucher is admitted, yet if it fail, the tenant must act anew to prevent judgment.

Therefore I apply myself to shew, that the tenant by warranty might have shewn the death of the vouchee; and that he should have done it.

Thus in 8 H. 7. pl. 3. the tenant in *formedon* vouched; the vouchee died; and the tenant again vouched of himself.

So in 50 E. 3. 2. b. it appeared that the vouchee was dead, and that the tenant was ready to vouch again. So in *Trin.* 17 E. 3. fol. 41. b. Tenant vouched two, and the sheriff returned one dead; and the tenant would have had the survivor called, to enter into the warranty, but he was driven by the court to vouch instantly; then he vouched the survivor, *sed non allocatur* says the book; upon which he vouched the survivor and the heir of the deceased, and that was allowed. So in *Dy.* 7. pl. 7. upon the *sumnoneas ad warrantizandum*, the sheriff returned that he was dead: *Tenetur* that the tenant shall be received to vouch again, because the vouchee had not entered into the warranty.

So that the tenant shall be received to revouch, but shall not be called to it by process. And this is a very true and a very plain distinction.

The tenant by warranty continues tenant to the demandant, and may act and do every thing, till by his voucher he puts another in his place: As soon as *that* is done, that is to say, as soon as the vouchee comes in and enters into the warranty, the tenant is no longer a party in court. *Hob. 47.* Therefore if the vouchee die before he has entered into the warranty, the tenant that vouched him may shew that to the court, and may revouch. But if he die after entry into the warranty, it must appear by the return of the sheriff; because the tenant is not in court to shew it. *M. 8 E. pl. 11. 13 H. 7. pl. 1.*

All this I offer to shew; 1st. That the tenant *might* have revouched; and 2dly. That he *should* have revouched.

If the law were otherwise, what would be the case of the demandant? If the tenant were absent on this return, he should have a petit cape, which is almost as good as a judgment to have seisin. Shall he be in a worse condition, when the tenant is present, and says nothing? Yet he is in a worse condition, unless the court can give judgment against him by *nil dicit*.

Whenever a man is in court, under a duty to answer, and does not, 'tis saying nothing; and the court *ex officio* are to enter *that*, and give judgment by *nil dicit*. This is plain from the form of the entry: It does not suppose the party to be called upon; it only supposes him to be in court, under a duty to answer, and that he does not; *et prædictus (the defendant) venit & nihil in barram actionis prædictæ dicit, per quod (the demandant) remanet indefens*. 2 Saund. 44. *Williams v. Gwin.*

In a writ of dower, the defendant appeared and said nothing; upon that the court awarded a grand cape, and upon the return of that gave final judgment: Upon this judgment the tenant brought a writ of error; and assigned for error, that there ought not to have been a grand cape awarded, because the tenant was in court. That was allowed, and it was agreed by the whole court, that final judgment might have been given. The court however, though they admitted the not giving final judgment, but awarding a grand cape, was irregular; yet as it was for the advantage of the tenant, they would not allow him to assign it for error.

How does this case and the case at bar differ? Here the tenant comes in upon the return of the *summoneas*, and *nil dicit*; in the case at bar, the tenant comes in upon the return of the *grand cape*, and *nil dicit*.

I have argued thus, on a presumption that the grand cape was regular; and that the court would take notice of the return, by the sheriff of the *Queen's county*.

But supposing that process and the return thereon to be void, then this will turn to a default; and there will be a default after a default.

Here

Here is a summons into the county of *Corke*, and a grand cape returned by the sheriff of the *Queen's* county.

(a) First, This is a void process; for all process ought to ensue its original. If the summons was to the county of *Corke*, the grand cape ought to be to the sheriff of the same county; and should not go to the sheriff of the *Queen's* county, unless by way of *testatum*.

Secondly, This is the fault of the tenant by warranty, and not the fault of the court; for the summons is at his seeking, and *in auxilium ejus*, and so must the other process that ensues after it.

Thirdly, This defect will turn to a default of the tenant by warranty; for the default of the vouchee, on the return of the grand cape, is the default of the tenant: And so is *Co. Lit.* 101.

b. If there be a default on the grand cape, against the vouchee, final judgment shall be given.

This then must be taken for a default, at the day of the return of the grand cape, if the court cannot take notice of this return.

In the 14 *H. 6.* 19. *in fine casus* 'tis held, that if one casts an essoin, where he ought not, it turns to a default. And is there not the same reason to make the taking out a wrong process, merely to delay the demandant, a default? If so, there ought to be final judgment; for here was a default after a default.

And to prove the last part of his argument, he cited 2 *Ro. Abr.* 764. 2 *Saund.* 39. *Cro. Car.* 341. and so concluded.

Mr. *Lutwyche* for the tenant, against the writ of error.

This is a writ of error of a judgment given in the *Queen's Bench* in *Ireland*, whereby a judgment given in the Common

(a) *E contra* it was answered, 1. That the land of the vouchee, in whatsoever county, is bound to the warranty; and therefore there is a difference where the *magnum cape* is awarded against the tenant, and where it is awarded against the vouchee. In the first case, it must issue into the same county, where the writ is brought; because it is to seize the land demanded: But when it issues against the vouchee, it is to seize his lands to the value; and therefore the sheriff may return that he has no lands, which he cannot do, where it is against the tenant. 2. That awarding the process is the act of the court; and therefore the tenant ought not to suffer by it, nor the first vouchee. If the process was not rightly awarded, it is the fault of the court. 3. That there is no default of the tenant: And it is not reasonable, that a man should lose his land peremptorily, where the right does not appear to the court; and where the tenant has not been in contempt. So is *Yelv.* 211. and *Cro. Jac.* 292. for the law is cautious in giving final judgment, unless on contempt or default. 1 *Lutw.* 860. The tenant cast an essoin, which the demandant challenged, because the tenant appeared by attorney; the tenant demurs, and the demandant joins in demurrer. The challenge was adjudged good, and judgment of seisin given for the demandant in *C. B.* which was afterwards affirmed in *B. R.*; because when the tenant cast an essoin, and that was challenged, the tenant by his demurrer affirms it, and abides by it: And this being turned to a default, is peremptory after appearance. Also the mischief of delay was a great motive to the court in their judgment. But if he had waived the essoin, by saying it was cast by a stranger, it had been otherwise; or if he had made default at the day of adjournment, a petit cape must have gone. It was much doubted in that case, if final judgment should be given; and yet *there* all the default was of the tenant: But here there is no default in him.

Pleas

Pleas there was reversed: And the only error assigned here is, that the Queen's Bench in *Ireland* did not give judgment for the demandant to have seisin.

Tho' it will be difficult to justify every part of the record, yet I think no material fault can be found with it, that concerns the tenant, till it comes to the return of the grand cape; for upon the voucher of *Hugh Harding*, he, being returned summoned, casts an essoin: That essoin was allowable by law, as appears by *Rast. Ent.* 376. *b.* and many other precedents; and therefore the first error assigned in *B. R.* ought to be over-ruled.

Then upon his not appearing at the day to which he was essoined, there goes out a grand cape, which commands the sheriff to seise the vouchee's lands, and summon him to appear to shew cause *quare non servavit diem suum per essonium ei datum*.

Obj. The first fault in this record is in the demandant; for when *Hugh Harding* makes default, at the day given by the essoin, the demandant prays judgment of seisin: Now there is certainly no colour for that, because the vouchee has a liberty to cast an essoin, as well as the tenant; and in that precedent in *Rast.* 376. *b.* the very words of the grand cape are, that the sheriff should summon the tenant *ostensurus quare non servavit diem ei datum per essonium suum*.

Therefore it was certainly proper to issue out a grand cape against the vouchee; and as it was necessary to be issued out, so is it likewise necessary to be returned served, before the demandant can have judgment.

I take this return of the sheriffs of *Queen's* county to be no return at all: It is as much void, as if no return had been made. For the summons against *Hugh Harding*, the vouchee, went into the county of *Corke*, and so the grand cape must follow into the same county: And then when the sheriff of *Queen's* county returns that process, it can be of no avail at all; and consequently that writ, for ought that appears, remains unreturned.

Taking it then that this writ of grand cape remains unreturned, the demandant cannot be entitled to judgment of seisin.

The law, in favour of the tenant in this action, has allowed and provided a course of process, in all events, against the vouchee, to bring him in, that he may have the benefit of his warranty; and thereby recover judgment in value against the vouchee. And that process against the vouchee must be determined and run out, before the demandant can have his judgment.

First, there is a *summoneas ad warrantizandum* against the vouchee: If he appear, and afterwards make default, then a *petit cape* is awarded against him; and if he make default upon that, then the tenant has his end proposed, and so gets judgment.

If it be returned upon the *summoneas ad warrantizandum*, that the vouchee has nothing to be summoned by, then there goes out an *alias* and a *pluries* and a *sequatur sub suo periculo*: And if *nihil* be returned upon all these, and the vouchee cannot be brought in, then the demandant must have judgment against the tenant; but the tenant in that case cannot have judgment against the vouchee, because it appears he has no lands and was never warned.

But in that case the law favours him with three writs, before the *sequatur*, to try to bring him in.

If the vouchee be returned summoned and make default, then there goes out a *grand cape*; and if upon that it be returned that he has seized the lands of the vouchee and summoned him, and he makes default, then likewise the tenant recovers in value. Thus far my *Ld. Coke* goes in 1 *Inst.* 101. *b.*

But then, suppose the sheriff return upon the *grand cape* that the vouchee has no lands, as he may in case of the vouchee, but not in case of the tenant, according to 9 *H.* 6. 41. *Co.* 14. *H.* 6. 14. *b.* and 19. *b.* If, I say, the sheriff make such a return, or if he make no return all, what is to be done? I hope to make it appear, in that case, that before the demandant can have judgment, there must be an *alias grand cape* and a *pluries*, and a *sequatur sub suo periculo*; and this is warranted both by authorities and precedents.

In the old book of *Entr.* 191, 192. and *Rass. Ent.* 337. *b.* [the same in both books] there is a very remarkable precedent, and one that in some of the circumstances comes very near this case.

In *formedon*, laid in *Somersetshire*, the tenant vouches, and the vouchee is summoned in the county of *Oxon*, and casts an *essoyn*; but not appearing at the day given him by the *essoyn*, a *grand cape* issues, and to that the sheriff returns *mandavi ballivo libertatis qui nullum mihi dedit responsum*. And thereupon another writ of *grand cape* issues, with a *non omittas*, and upon that it is returned that he had no lands; and thereupon an *alias*, and a *pluries*, and a *dictum est quod sequatur sub suo periculo*. And upon the last it is entred *quod vicecomes non misit breve*; And thereupon the demandant prays judgment of *seitin*, *eo quod dictum fuit* (the tenant) *sequeretur sub suo periculo*; *Et idem* (the tenant) *de vocare suo prædicto defecit, eo quod nullum breve in hac parte prosecutus est, nec ullum breve pro defectu ipsius prosecutionis returnatum existit*. The tenant pleads that he did sue out a writ, and deliver it to the sheriff of *Oxon*, but that the vouchee was dead: And therefore vouches another, &c. And upon that the demandant demurs.

Now by this precedent it plainly appears, that if, on the writ of *grand cape*, it be returned that there are no lands, the demandant is not to have judgment; but the tenant is to have the privilege of an *alias*, a *pluries*, and a *sequatur sub suo periculo*, before judgment can be given against him. And the law gives him

him this privilege, to see whether he can bring in the tenant, to have judgment against him; and if he does not vouch him, he has no remedy: For if he has judgment against him in a *warrantia chartæ*, and, when he comes to be impleaded, neglects to vouch him, as he ought, he shall lose the benefit of his warranty. And so is *F. N. B.* 134, 5.

Therefore in this case *Abraham Batten* ought to have had the privilege of three *grand capes* and a *sequatur* before the demandant should have judgment against him.

17 E. 3. 8 Fitz. tit. *Sequatur sub suo periculo*, 2. *Precipe quod reddat*, the vouchee summoned in another county and made default, and *grand cape* issued; and then a writ of extent issued, to the sheriff of the county where the demandant was, to the value of the lands, and an *alias grand cape* and a *pluries*, and no extent returned; and then the demandant prayed a *sequatur sub suo periculo*, and had it.

And this is agreeable with other instances of process against the vouchee.

14 H. 6. 7. b. *Per Fulch.* Tenant vouches one, who said he was within age, and issue joined upon that, and a *venire facias*, *alias*, and *pluries*, and then *sequatur sub suo periculo*; and the writ not being served, the demandant had judgment.

This shews, that before final judgment is in any case given, against the person that vouches, if there be a default in not serving the writ, he has the privilege of three writs and a *sequatur*.

14 H. 6. 7. In *formedon* the tenant vouched, and process was continued against the vouchee, till the *sequatur sub suo periculo*: At the day of the return, the writ was not served; and the defendant's counsel shewed this matter, that the tenant had delivered the writ to the sheriff, but that the vouchee was dead, and so prayed that he might revouch. The demandant prayed *seisin*, and the matter was largely debated; and it was made a doubt whether the party could plead the death of the vouchee, or whether it ought not to be returned by the sheriff: But however, tho' this was in case of a *sequatur*, &c. yet they could not agree to give judgment for the demandant.

These cases are much stronger why the demandant should have judgment, because the person that vouches has run out the whole length of his process; and therefore if in those cases he does not procure the return of the sheriff, upon the *sequatur*, &c. it is at his peril. But in our case, where there never was but one *grand cape* awarded, if there had been a default in the vouchee's not getting it rightly returned; yet the consequence ought only to have been an *alias* and a *pluries* and a *sequatur*, &c. before final judgment can be given against him. And as to that which is called a *sequatur sub suo periculo*, there is no difference as to the writ itself; but only the court enjoins the tenant *sequatur*

tur sub suo periculo, because it is the last writ of that kind he is to have. And in the old *N. B.* 178. 179. *a.* when he gives the form of the *sequatur*, &c. it is no other than the first writ; but it puts the party upon his guard: *contra* of the first writ.

And therefore the sheriff ought to summon him, to give him an opportunity to make his excuse; but in this case there being no return of the writ, there can be no judgment over in value. For it might have been returned upon that writ (as is before mentioned) that *H. H.* had no lands, &c.

This mistake can't be imputed to the tenant or the vouchee: It does not appear that either of them are in fault.

But tho' it should be agreed that judgment might be given, without any return of the writ, yet it appears that the vouchee is dead: And tho' this was an improper return by the sheriff of *Q.*'s county, yet it seems to be agreed to by the demandant; for the record says immediately that the demandant *hoc non dedicit*. In that case, where the demandant confesses it, there is no doubt but he has a liberty to revouch. And this appears in 17 *E.* 3. 8. 41. 2 *Ro. Abr.* 764. and several other books.

Now all that comes after the return of the sheriff is the act of the court. The resummons is the act of the court; and tho' it might not be necessary, yet it will not make the proceedings erroneous.

Hub. 47. (*E.* of *Clanrickard's* case) to grant an essoin where none lies is erroneous; but to deny it is not.

No resummons lies but at the instance of the demandant. It must be presumed that he desired it. *Co. Lit.* 135. for it does not lie but at his desire. And the demandant never prayed seisin in this case, at the return of the writ, but only at the default upon the first essoin.

If an essoin cast turns to a default, then a *petit cape* ought to issue after appearance. 9 *H.* 5. 12. Essoin cast after issue joined, and the court adjourned it, and held not allowable; and yet only *petit cape* granted.

The tenant appears upon the day given by the resummons, and then the demandant does not appear; so that here is *non prof'* and a discontinuance. 1 *Ro. Abr.* 486.

He never demanded judgment but when he could not lawfully have it; so that having submitted to all these proceedings, and never prayed judgment, he cannot be relieved.

If this judgment upon the nonsuit should be reversed, yet there ought to be no judgment of seisin, for the reasons before; and if no judgment of seisin, I conceive the court cannot reverse the judgment of the *Q. B.* in *Ireland*; for the only error assigned is, that the court of *Q. B.* in *Ireland* did not give judgment of seisin.

As to the writ of error we have two exceptions :

1. The writ of error is to remove a record of a judgment, *hoquelâ, quæ fuit in curiâ Gulielmi nuper regis, coram Ricardo Cox milite & sociis suis tunc justiciariis ipsius nuper regis*; and the *placita* is *Placita coram Ricardo Cox &c. secundo ANNÆ reginæ*. The record indeed says, *Alias prout patet termino sancti Michaelis decimo tertio Willielmi tertii, continetur sic*; but does not say that it was *coram Ricardo Cox*.

2. It is a writ of error of a judgment given in *B. R.* upon a reversal, but not sufficiently described.

Note; The court seemed to incline that these exceptions were fatal; and at last, on the strength of them, quashed the writ of error. Afterwards, in *Mich. 11 Ann.* (inter *Sbirt* and *Carr*) a similar writ was quashed, for the very same faults. But since, by 5 *Geo. 1. c. 13.* it is enacted, "That all writs of error, " wherein there shall be any variance from the original record, " or other defect, may and shall be amended, and made agreeable " to such record, by the respective courts where such writ or " writs of error shall be made returnable."

Trin. Term, 1712.

11 Annæ Reginae, rot. 220. in B. R.

Backhouse *versus* Wells.

EJECTMENT for 16 acres of land, 16 acres of meadow, and 16 acres of pasture, in *Longborough* in the county of *Gloucester*; and, on not guilty, there is a special verdict, which finds:

That *Thomas Barker* was seised in fee of the lands in question; and being so, 2d of *June* 1707, made his will in writing as follows: "And as for my worldly estate, wherewith it hath pleased God in a bountiful manner to bless me, To the intent " that all my lands, tenements, and hereditaments, (purchased " all by myself) may go to remain and be in my name or blood, " so long as it shall please Almighty God to continue the same " in being; I do hereby give, grant, and devise unto my near

4 I

" kinsman,

Fortef. 133.
10 Mod. 181.
Gilb. Caf.
B. R. 20.
129. S. C.
Eq. Caf. abr.
184.
8 Mod. 261.
Fitzgib. 12,
22.
Str. 731.
Fearne S. C.
cited.
And see the
case of *Fen-
nercau* and
Fennercau,
ante.

“ kinsman, Capt. *John Barker* of *B. &c.* all those my lands,
 “ grounds, tenements, tithes, and hereditaments whatsoever,
 “ lying and being in the manor or reputed manor of *Southfield*,
 “ alias *Banks-Fee*, within the parish of *L.* called by the name of
 “ *Caswells*, with their and every of their appurtenances; subject
 “ nevertheless to the payment of such annuities, or sums of
 “ money yearly, as shall be hereafter by these presents given,
 “ bequeathed, limited, and declared: To have and to hold
 “ to him the said *J. B.* for the term of *his natural life only*,
 “ but without impeachment of or for any manner of waste;
 “ and from and after his decease, then to the *issue male of*
 “ *his* body lawfully to be begotten, if God shall hereafter bless
 “ him *with such issue*, and to the heirs male of such issue law-
 “ fully to be begotten; and for default of such issue, then to
 “ my near kinsman *John Bracy*, (the lessor of the plaintiff) and
 “ to the heirs male of his body lawfully begotten; and for want
 “ of such issue, then to *James Bracy* in like manner; remainder to
 “ *Thomas Bracy* in like manner; remainder to his own right heirs.”

That the lands devised are the lands in the declaration.

That the devisor died, (10th of *July*, 1707;) and *John Barker* entered, and (23d of *October*, 1707) covenanted, by deed, to levy a fine and suffer a recovery, in which he was to be vouched, and to vouch over the common vouchee. And that (in *Michaelmas* term 6 *Annæ*) a fine and recovery were accordingly levied and suffered.

That the 10th of *Feb.* 1711, the said *John Barker* died, having never had any issue of his body. That the lessor is the same *John Bracy*, who by the will is to take next after the decease of *John Barker* without issue male.

That the defendants *John Wells* and *Katherine Wells*, immediately after *John Barker's* death, entered into the lands. That the lessor of the plaintiff entered, and made the lease to the plaintiff; who entered and was possessed, till ejected by the defendants: *Et si, &c.*

The third day in *Trin.* term 1713. viz. *die lunæ proxime post octobas Sanctæ Trinitatis* (8 *Junii*) this special verdict was argued, by Mr. *Fazakerly* (a) *pro quer.* and Mr. *Jefferys pro def.*

For the plaintiff it was alledged, That the single question would be, whether *John Barker* had, by this will, an estate tail executed in himself; or only an estate for life. *Fazakerly* contended for the latter; and that the fine and recovery were forfeitures, and gave to the lessor a title of entry *then* or within five years.

He agreed that the rule in 1 *Inst.* 22. and in *Shelly's* case (1 *Co.*) is, that where the ancestor takes an estate for life, by any gift or conveyance at common law, and in the same conveyance, an estate is limited immediately to his heirs, in fee or in tail; that in such case, *heirs* is a word of limitation, and not of purchase.

(a) *N. B.* From this time, Mr. *Fazakerly* appeared in full business.

And

And as to *King v. Melling*, 1 *Vent.* 225. 2 *Lev.* 58. A devise to *Melling* for life, and after his death to the issue of his body, and for default of such issue the remainder over; he agreed that, with much difficulty, it was agreed to be an estate tail in *Melling*: But this case (he said) stands clearly distinguished from that.

And *first*, he premised the rule for construing wills, according to the testator's intent. *Secondly*, he argued that there was no necessity for construing *issue* as a word of limitation, but as it will best square with the testator's intent. Therefore, if lands be given to one and his issue, — if he has then no issue, it will be construed an estate tail: if he has issue, they will take jointly with him by purchase; but if the limitation be, by way of *remainder*, to the issue; or after the death of the devisee, then to the issue; there all the issue will take by purchase. 6 *Co.* 16, 17. where the devise was to *A.* and his *children*; but the resolution is, that if it had been to *A.* and his *issue*, the effect would have been the same. And in 3 *Lev.* 431. Issue is held for a good word of purchase. So that *issue* has been variously expounded, according to the different circumstances of the case: And if so, there only remains to shew the devisor's intent.

It will hardly be controverted but that *issue*, in a conveyance at common law, had been only a word of *purchase*; and it must be the same in a *will*, unless some manifest intention appears to the contrary. But here it is manifest that the testator intended to make *John Barker* tenant for life *only*; for the following reasons.

1. The words are to *J. B.* to hold for the term of his natural life *only*; which word has the force of a negative, and excludes every thing not expressed: And can any one say, that, if this be construed an estate tail, the devisor's intent is fulfilled; who intended an estate for life *only*? Therefore by that rule in 10 *Co.* 57. that *parliamentum testamentum et arbitramentum* are to be taken according to the intention of the parties, this limitation, to a man for life *only*, can only create an estate for life.

Then he observed, how hardly the case of *King* and *Melling*, 2 *Lev.* 58. 1 *Vent.* 225. was adjudged in the *Exchequer Chamber*; and how *Ld. Hale*, till the judgment, was against it; which shews, as if the Judges had gone as far in that case as they could justify. But in this case they must go farther, to make an estate tail, for in *King* and *Melling's* case, there were no *negative* words to exclude such estate: the words there being strictly satisfied, if *Melling* had an estate tail; for then he had an estate for life, tho' not for his life *only*. And it is admitted by my *Ld. Hale*, 1 *Vent.* 231. [and for that purpose *Byfield's* case is there cited] that if there had been *negative* words, such as for life, *et non aliter*, it had been but an estate for life; and to give an estate for life *et non aliter*, is to give an estate for life *only*, and *à converſo*.

That *issue* being no legal word of limitation, can only be so in a will by *implication*; which can't prevail against an express limitation: Thus where a man takes an express estate, it can never be enlarged by any implication afterwards. 3 *Leo.* 71.

Land devised to one, *to dispose of at his will and pleasure*, is a fee; but if it were to *A.* for life, *and after his decease he to give the same to whom he will*, that is but an estate for life, with a power to dispose of the fee. So a devise *imperpetuum* is a fee; but *imperpetuum during his life*, is not. 15 *H.* 7. 12. The reason is, that the intention shall never be taken, against the express words of the will. 3 *Cro.* 498.

2. He observed, that the testator, immediately after, made *Barker's* estate *dispunishable of wast*; which shews his intent not to give him any estate but what was *punishable for wast*, which must be for life or a less estate: And this was much relied on in the case of *Loddington v. Kime*, 3 *Lev.* 431. and 2 *Co.* 23. *Baldwin's* case.

3. He observed, that the devise was not intended to be of effect, unless "God should in the time to come, or hereafter, "bless *J. B.* with issue male;" which cannot be construed to give an estate tail *immediately*, since the limitation to the issue is on such a precedent contingency. Then he cited the case of *Bacon and Hill*, *Mo.* 464. which much resembles this case, only the contingency here is much stronger.

4. He observed, that, after having limited the estate to the issue male, the deviser limits it to the heirs male of the body of such issue; which proper limitation, coming in the same breath, shews, he never intended the word *issue* for a word of limitation, but of purchase; and it can't be presumed, that he added those last words to be useless and impertinent, which they must be, if the word *issue* comprehended as much; since, by a reasonable construction, both may be made useful. And for that purpose he cited 2 *Euist.* 178. where the rules for construction of wills are laid down; viz. 1. That they be not construed *per parcelas*; 2. That they admit of no contradiction; 3. That no nugatory thing ought to be in a will: And by *Dodd.* 3 *Bul.* 105. *Maledicta expositio quæ corrumpit textum*, either by addition to, or diminution from, the will; and that the office of a Judge is to make them both agree.

He also cited *Mo.* 593. *Clark v. Day*, 3 *Cro.* 313. *Archer's* case. 1 *Co.* 66. and 3 *Cro.* 453. 1 *Ro. Abr.* 626. pl. 4. *Pawsey v. Lawdal.* And *Loddington v. Kime*, 3 *Lev.* 431.

5. This construction will be enforced, by the various penning of the limitations: The first being to *J. B.* for life without impeachment of wast; remainder to his issue (*ut supra*): But the next remainder, to the lessor of the plaintiff, is to him and the heirs male of his body; and two remainders over are in the like manner: Which shews a different intention. Besides, the intent

tent of the deviser appears to be, that his lands may go to, remain and be in his name or blood, as long as it should please God to continue the same; and the reason for limiting it to *J. Barker*, only for life, was because he had then no issue.

And he concluded for the plaintiff, on the authority of *Wild's* case, and *Loddington and Kime*, and *Taylor and Sayer*, 3 Cro. 742. which (if law) is an authority. And it seems to be of little weight, whether *issue* should signify the same thing in a will as heirs of the body; for then *Archer's* case, &c. are authorities for the plaintiff. And though the remainder should be void for the uncertainty, yet the deviser's intention is plain, that *J. B.* was to have an estate for life only.

The argument of *Jeffreys* for the defendant is in *Fortes.* 134.

Afterwards, in *Mich.* term following, Mr. *Lutwyche* argued for the plaintiff, to the following effect:

The question, upon this special verdict, is upon the construction of this will, Whether the devisee, *John Barker*, be tenant in tail; or only tenant for life? If tenant in tail, then it must be agreed that he had power to bar the remainder, to the lessor, by the recovery which he suffered. If only tenant for life, then the recovery does not hinder the lessor of the plaintiff, *John Bracy*, from claiming by virtue of the remainder; and he has a good title.

I am to endeavour to make out, that *John Barker* was only tenant for life; and I insist,

1. That it was the plain intent of the testator, that he should be only tenant for life.
2. That his intention is agreeable with the rules of law; which will construe the words of the devise, to amount to no more than barely an estate for life.

As to the intention of the testator, that seems very plain; both from the words that create the estate, and from other parts of the will.

First, he introduces the devise with these words, "*As to my worldly estate, &c. that it may go, remain, and be in my name or blood.*" Now it is the ordinary prudence of every man who intends to settle his estate, so as it may remain in his name and blood; to make the first taker tenant for life only: the experience in all settlements is agreeable to this notion. And here, the deviser has endeavoured to preserve his estate, either in his name or blood. *John Barker* indeed is the only devisee of his name; but the lessor of the plaintiff (who is the remainder-man) is of his blood; for he calls him his near kinsman *John Bracy*: And therefore it can't be supposed that he would put it in the power of the very first taker, to destroy that intention; which in fact he endeavoured to do, immediately after the death of the testator, for he died but July 10 1707, and *John Barker* levied a fine and suffered a recovery in the *Michaelmas* term following.

In the next place, when he comes to the words of the devise, they seem to express his positive intention, that *John Barker*

should be only tenant for life: For he devises the lands called *Casswells*, subject to some particular annuities; and then in the *habendum*, which is the proper place for limiting the estate, he says; *To have and to hold the said lands and premisses to the said John Barker, for the term of his natural life only.* That word *only*, seems to be put in, on purpose to prevent any imagination, that *John Barker* should be more than tenant for life; and accordingly he goes on, as knowing that tenant for life would be liable to waste, and says, *but without impeachment of or for any manner of waste*; which clause could be to no purpose if he designed him to be tenant in tail: And that is not answered by the instance that was mentioned in *King and Melling's* case, where there was a clause, in the will, that the devisee should have power to make a jointure; for *there* it must be his intent, notwithstanding that, to make him tenant in tail, because he could not make such a jointure without a *power*, unless he destroyed the estate tail; but in our case, the clause of being *dispunishable of waste* would be useless.

In the next place, the testator goes on, and shews how his lands shall go after the death of this tenant for life: "*And from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall hereafter bless him with such issue, and to the heirs males of the body of such issue lawfully to be begotten.*" These words seem to intend a contingent remainder to the issue: It is to the issue male of his body lawfully begotten, if God shall bless him with such issue. These words "*if God shall bless him,*" express the contingency, and seem to intimate that the devise should have no operation, unless he had such issue. And then, when he has vested it in the issue as a purchaser, he adds words proper for limitation, viz. "*And to the heirs males of the body of such issue, lawfully to be begotten.*" And then he limits the remainder to the lessor of the plaintiff, viz. *And for default of such issue, then to his near kinsman John Bracy, and to the heirs male of his body*: there, it being a remote remainder, he makes him tenant in tail; and plainly distinguishes between his words of limitation in the one case and the other.

These several parts of the will may sufficiently shew the intent of the testator, that *John Barker* should be only tenant for life.

2. In the next place, His intention is agreeable with the rules of law; which will construe the words of the devise, to amount to no more than barely an estate for life.

If the intention of the testator was to make him only tenant for life, there is no colour to say there is any rule of law broken by making that construction: Nay, the strictest rules of law, even in construction of deeds, will be observed. For if these words were in a deed, *To one for life only, and after his decease, to the issue male of his body, and to the heirs male of the body of such issue,*

issue, those are proper words to make a tenant for life, remainder to the issue in tail.

* The word *issue* is a good name of purchase; and so is *Co. Lit. fo. 36.*

Indeed where there is an estate for life, limited by deed, and afterwards there comes a limitation to the heirs of his body, *there* it will be an estate tail; because there is an express rule of law, in that case, that whenever the ancestor takes a freehold by deed, and there is afterwards an estate limited to his heirs, that makes an inheritance; but the reason of that is, because the word *heirs* is a word of art in the law, which is necessary to make an estate of inheritance, and which in that particular case, by a rule of law, will have that effect; but if other words are made use of, and not the word *heirs*, it has not that effect in a deed: And that is the common case of a tenant for life, remainder to his *sons* or his *children*, in that case it will vest in them as purchasers. Why then should it not be so in case of a will, if it be the party's intention? The law often helps the testator's intent, where there are improper words; but it would be very strange, if a testator's intent be to make a tenant for life, and he uses words that are strictly proper for it, that the court should construe it otherwise; for that would be so far from favouring the will, that it would take away the benefit of the law from him.

There are no particular words necessary to make an estate tail in a *will*, as there are in a *deed*; and therefore the same words will be differently construed, where the parties intention appears, so as to agree with that intention: This is manifest by the resolution in *Wild's case*, 6 *Co. 16. b.* *There* the devise was to *Rowland Wild* and his wife, and after their decease to their *children*; they had then a son and a daughter; And the question was, Whether they had an estate tail, or an estate for life with remainder to their *children* for life. And it was resolved, after argument before all the Judges of *England*, that it was an estate for life with remainder to the children for life, and no estate tail.

The reasons, given for this resolution, seem to suit the case now in question. For the Judges first consider what would be the construction upon those words, if they had been in a deed; and they said, without question it would have been an estate for life, with remainder to the children for life: Therefore, say they, what reason can be given, why it should be an estate tail? To that will be answered, the intent of the testator; but then, say the Judges, that intent must be manifest and plain, and not obscure and doubtful: And in that case, they say his intent does not appear plainly, that it should be an estate tail; for perhaps his intent was agreeable with the rules of law.

But

But indeed, where a devise is to a man and his children, and he has none at that time, there the children cannot take *in presenti*; and in *remainder* they cannot take, because it is limited to them *in presenti*; and therefore, in that case, if those words are to have any effect at all, they must make an estate tail.

This difference proves, that it is the intent which governs, and makes it an estate tail; otherwise the law will prevail.

As to authorities from cases which have been adjudged, there are several that seem to come up, *in reason*, to the case in question; but because the case of *King and Melling* is the main authority that is relied on, or that seems to give any colour, for making this an estate tail, therefore I shall first give an answer to that.

That case is reported in 2 *Lev.* 58. and 1 *Vent.* 225. *R. Melling* seised in fee, having issue four sons, *William, Robert, Bernard, and John*, devises the land in question in this manner: "I give my land to my son *Bernard* for his natural life, and after his decease, I give the same to the issue of his body lawfully begotten on a second wife; and for want of such issue to *John Melling* and his heirs for ever; provided, that *Bernard* may make a jointure of all the premises to such second wife, which she may enjoy during her life." In this case, it was adjudged in *B. R.* that *Bernard Melling* had but an estate for life; and that was by the opinion of Justice *Twisden* and Justice *Rainsford*, against the opinion of Ch. J. *Hale*: But tho' *Hale* differed in opinion at last, yet even he was a great while of another opinion; which shews that the case was exceeding doubtful. That judgment indeed was reversed in the *Exchequer Chamber*: But without entering into the merits of the reversal, I shall proceed to shew, that it differs entirely from this case: And I think the reasons, which Ld. Ch. Just. *Hale* goes upon in that case, plainly shew the difference, and will rather be an authority for us in the case in question.

First, It must be observed, that my Ld. *Hale* grounds his opinion upon the intention of the testator. And therefore, if the intention of the testator was not so in the case in question, that case will be no authority: And I think I may say, from the observations I have before made, that it is much plainer in this case, that the testator intended only an estate for life, than that an estate-tail was intended in the case of *King and Melling*.

In the next place, here are restrictive words; — *To hold to him for the term of his natural life only*: And that, my Ld. *Hale* himself seems to own, would have made a different case; for he cites a case of a devise to an eldest son for life *et non aliter*, and after his decease to the sons of his body, which he says was held an estate for life, by reason of the words *et non aliter*. That case is cited in *Vent.* 231. as being in 1 *Ro. Abr.* 839. but it is in a *Ro. Abr.* 837. pl. 13. and there *non aliter* is omitted.

3. The clause making the estate without impeachment of waste was not in that case; and that clause could have no effect if it were an estate tail: And though my *Ld. Hale* answers the power which was given to make a jointure, that tenant in tail could not make a jointure without it unless by destroying the estate tail, that will not answer this clause.

4. The words of limitation, added to the issue that were to take, viz. *to the issue male of the body, and the heirs male of the body of such issue*; This my *Ld. Hale* owns to be a difference, and takes notice of *Archer's case*, fo. 66. b. Where the devise was for life, and after to the heir male of the body, and the heirs males of the body of that heir male: There, says he, the words of limitation being grafted upon the word *heir*, that word was intended only as *designatio personæ*, and not for limitation of the estate; and for that purpose he also cites 3 *Cro.* 313. *Clerk and Day's case*. This is the stronger in our case, because he names *issue male* for the words of purchase; and the words of limitation are very proper, and in the terms that the law prescribes, viz. *to the heirs male, &c.*

Lastly, In the case in question, the testator distinguishes between an estate tail and an estate for life; for in other parts of the will he limits estates tail by proper words. So it is to the lessor of the plaintiff, and the *heirs male of his body*: And so likewise, in the instance of the limitation to the *issue*, in the same sentence he distinguishes between that and the *heirs male of the body*.

✍ *Vide the case of Lisle v. Grey, Raym. 315. 2 Lev.* which case (says Mr. *Lutwiche*) would have been material to have been cited, but was omitted.

In the principal case, judgment was given for the plaintiff by the whole court.

Trin. Term, 1712.

11 Annæ Reginae in C. B.

Thornby *versus* Fleetwood.

THIS case was thrice argued at the bar in C. B. 1. In *Trin.* 11 *Annæ*, by Serj. *Hooper* for the plaintiff, and Serj. *Pengelly* for the defendant; 2. In *Mich.* following, by Serj. *Pratt* for the plaintiff, and Serj. *Selby* for the defendant; and 3. In *Hil.* following, by Sir *Thomas Powys* for the plaintiff, and Serj. *Cheshyre* for the defendant. The arguments of Serj. *Hooper* and Serj. *Pratt* for the plaintiff, and of Serj. *Pengelly* and Serj. *Selby* for the defendant, were never before published: And they were, in substance, as follows.

Serj. *Hooper*. This is an ejectment brought upon the demise of the duke and dutchess of *Hamilton*. They have demised the estate in question to the plaintiff *Thornby*; who, by virtue of that demise, entered and was possessed, till he was ejected by the defendants. The defendants have pleaded not guilty; and issue being joined, the cause was tried before your Lordships. And the jury have found, in the first place, the pedigree of the *Gerrards*. They find that *Thomas* lord *Gerrard*, who was the common ancestor, had issue two sons; *Gilbert* his first son, and *John* his second son: That *Gilbert* had issue *Dutton* lord *Gerrard*, and one daughter who married into the family of the *Owens*; *Dutton* had issue *Charles* lord *Gerrard*; and he had issue *Digby* lord *Gerrard*, who was father to the dutchess of *Hamilton*: *John* had issue *Richard*, who had issue *Charles*, *William*, *Philip*, *Joseph*, and *Frances* who is the wife of the defendant *Fleetwood*.

The verdict finds, that *Charles* lord *Gerrard* being seised in fee of the lands in question, in *Staffordshire* and other counties, made a settlement of his estate (by lease and release dated the 28th and 29th of *November*, in the 12th year of King *Charles* the second) upon his marriage with *Jane* the daughter of *Digby*: Which settlement was to these uses. As to part of the lands, to *Charles* lord *Gerrard* and *Jane* his intended wife, for their joint lives and the life of the longest liver; remainder to the first and every other son of that marriage in tail male; and if there should
be

be failure of issue male, then there is a term of 500 years limited to trustees, to raise portions for daughters: Then it is limited over to the heirs male of *Charles lord Gerrard*, who made the settlement; and for want of such issue, to the right heirs of *Charles lord Gerrard*.

They find that *Charles lord Gerrard* in the special verdict and in the settlement was the same person; and that after making the settlement, the marriage was had, and they were seised, and had issue *Digby*, their only son. That *Digby* died without issue male in the year 1684, and that *John* the son, and *Richard* the grandson, died in the life of *Digby lord Gerrard*. That *Richard*, who was the grandson, had issue four sons and one daughter. That *Charles*, the son and heir of *Richard*, entered on the premises not in jointure, and was seised, claiming the residue after the death of the jointrix. That *Charles* and *Philip*, in the life of *Richard* their father, (that is to say) in the year 1676, being then infants and subjects of the king of *England*, did go into parts beyond the seas into a *Romish* seminary of jesuits, under the obedience of the king of *Spain*; with intent to reside in that popish seminary, and to be instructed in the popish religion, and in the church of *Rome*. That they resided there for the space of five years; and were educated in the popish religion, and continued to profess that religion. That *Charles* returned into *England* in the year 1681, and *Philip* in the year 1683; and that after the death of *Digby lord Gerrard*, *Charles* executed a bargain and sale of all the premises, not in jointure, to make a tenant to the *præcipe*, so that a common recovery might be had. That a common recovery was had accordingly, in which the tenant vouched *Charles*, the son of *Richard*. That after the death of *Jane*, the widow and relict of *Charles lord Gerrard*, her jointure dropping, there was another lease and release made by *Charles*, to make a tenant to the *præcipe*, and another recovery was had of the jointure estate. They find that *William* and *Joseph* died in the life-time of *Charles*, without issue. That *Charles* died a papist. That *Philip* is living, and still a papist. That the widow of *Charles* is living. And that *Roger Qwen* is the grandson of *Alice*, and living, and a protestant; and the next protestant of kin to *Philip*.

This case is great in value, for the whole estate of the *Gerrards* comes in question; but it is much greater in consequence. For the chief point is, Whether the great barrier against popery shall be shaken and set aside? There can be nothing more ungrateful, than endeavouring to take away the estate from the heir-general of the family, when the heir-general was postponed to make way for the heirs male; and yet, now there is a failure of that line, they endeavour to defeat the heir-general of that

that family: But we shall shew, that the law in this case is with the dutchess.

There will be four points in this case.

1st, That by the statute of king *James I. cap. 4.* which is a public law, he whom they call lord *Charles* (for I must say *Charles*, the son of *Richard*, never was lord *Charles*) and his brother *Philip* never had any estate or interest in these lands; being never able to take any thing in them, till they performed a condition precedent to the vesting of any such estate or interest in them.

2^{dly}, That the statute made in the first year of king *James* is not repealed, either by the statute of the third of king *James I.* or by the third of king *Charles I.*

3^{dly}, That neither of the recoveries suffered by *Charles*, either of the jointure estate, or of that which was not in jointure, are valid; for that there was no tenant to the *præcipe*, nor could any be made, in order to suffer such recovery.

4^{thly}, That *Philip*, who is the youngest son and last male of this family, is still living; yet nothing vesting in him, the estate goes over to the dutchess, there being an incapacity in *Philip* to take any thing.

To make out the first, it will be needful to observe, that by virtue of the settlement of the 12th of king *Charles*, all the entails and reversions in fee are vested in *Digby lord Gerrard*, who was the only son of lord *Charles*. For the first limitation was to him and his lady for life; then to the first and every other son of that marriage in tail; then to the heir-general of the body of lord *Charles*; then to the heirs of the body of lord *Thomas*; and then to the right heirs of the body of the lord *Charles*. Now lord *Digby* had all these in him: He was eldest and only son of lord *Charles*; he was heir-general of the body of lord *Charles*; and he was heir-male of the body of lord *Thomas*; and he is right heir of lord *Charles*. So that all these estates, limited by that settlement, were entirely vested in *Digby lord Gerrard*, charged with the lady's jointure: And there is no remainder vested in any of the collateral line.

Before the death of lord *Digby*, *Charles* the son of *Richard*, and the present *Philip* were disabled to take any estate; and that will appear by the clause in the act of the first of king *James*. The consequence is, that if the disability were attached before any estate vested in them, then nothing could vest in either of them; which will overturn the pretended title of the defendants.

The clause that makes out this disability, is in the first of king *James I.* "That all and every person and persons, under the king's obedience, which at any time (after the end of this session of parliament) shall pass or go, or shall send or cause to be sent any child or other person, under their or any of their

govern-

government, into any the parts beyond the seas, out of the king's obedience; to the intent to enter into or be resident in any college, seminary, or house of jesuits, priests, or popish order, profession, or calling whatsoever; or repair in or to any the same, to be instructed, persuaded or strengthened in the popish religion, or in any sort to profess the same; every such person, so sending or causing to be sent any child or other person beyond the seas, to any such purpose or intent, shall, for every such offence, forfeit to his majesty, his heirs and successors, 100*l*."

This is as to the persons *sending*; but then comes the clause as to the person *sent*.

"And every such person so passing, or being sent, beyond the seas, to any such intent or purpose as aforesaid, shall, by authority of this present act, as in respect of him or herself only, and not to or in respect of any his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have or enjoy any manors, lands, tenements, annuities, profits, commodities, hereditaments, goods, chattels, debts, duties, legacies, or sums of money, within this realm of *England*, or any other his majesty's dominions: And that all and singular estates, terms and other interest whatsoever, hereafter to be made, suffered or done to or for the use or behoof of any such person or persons, or upon any trust or confidence mediately or immediately to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions and purposes."

Now if this clause has essence still, and is not repealed, I think it is impossible to have words more strong, to put a disability on *Charles* and *Philip*, to take any thing in this estate. The words of the verdict find, that they were thus sent beyond sea, *with an intent* to be instructed in the popish religion; and that they went into a seminary at *St. Omer's*. So, by this clause, they were not only disabled to take this estate, but the use itself for their benefit is void. I take it the lord *Charles* was totally incapable, and nothing could vest in him, till the performance of a condition precedent; for there is a clause that says, If you do conform, then you shall inherit; and that I take to be a condition precedent. And there being no conformity found in *Charles* or *Philip*, nothing could vest in them. This act was made for promoting our religion, as by law established; and therefore ought to be construed liberally for obtaining the end for which it was made. But we have no need to labour for a construction. If there was an estate vested in them, before the disability found, this statute would not be in the case; for if the estate had been vested, then the subsequent statutes must have been considered. But this is the single statute that hinders the estate from vesting.

It will be objected, if the estate tail did not descend to *Charles* and to *Philip*, what is become of it? For it is and was well created by the settlement of lord *Charles*.

Ans. We think it will go, by reason of that statute, to those that are next in reversion or remainder; but they being disabled, it will be as if lord *Thomas* died without issue male. Here is no issue male in being at the time of the death of *Digby* lord *Gerrard*, who was capable of inheriting; and then it is, as if he died without issue: And then the estate must go to the heir-general, who is the dutchess. As to the lands, I take it the freehold must be in some body; and if it don't go to the dutchess, in respect of their disability, it can go to no body; and the law will always find out a tenant to the freehold. I say, by this clause, *Charles* and *Philip* are disabled; and this statute does not give it over to any other, as some other statutes do: Then if they are rendered incapable, it must go to the dutchess, who is the heir-general. This estate can't go to *Charles* and *Philip*, because they are disabled to take in respect of themselves only; and it can't go to the crown, because nothing vested in *Charles* or *Philip* to forfeit. If a statute says, such a one shall forfeit, that shall vest nothing in the crown, but what was vested in the party before; and if nothing was vested in *Charles* or *Philip*, it is impossible any thing should be vested in the crown, upon any offence they should commit. It can't go to the next of kin, for nothing in that statute mentions the next of kin. Then if it can't go to *Charles* or *Philip*, nor to the crown, nor to the next of kin, where can it go? To none but the dutchess, who is heir-general, and was to take on failure of issue male.

Now to prove that *Charles* was never lord *Gerrard*, there is the case of the lord *Delawar*, in 11 Rep. fol. 1. *William*, the son of *Thomas* lord *Delawar*, was, by act of parliament, disabled to enjoy any honour by descent; and when *Thomas* lord *Delawar* died, he was called no more than *William West*, Esq; till afterwards he was called by writ in queen *Elizabeth's* time; and then he sat as puisne lord. But that disability being only personal, when his son came to inherit, he petitioned the crown that he might sit in the place of his ancestors. It was referred to the consideration of the House of Lords, and they desired the opinion of the judges; and upon consideration of the matter, it was determined, that the petitioner's father was only *William West*, Esq; and was not lord, till he was called by the new writ. But when his disability was removed, his son was restored; and took place according to the antiquity of the barony.

This is the same case with ours; for it seems to be the same disability from enjoying that honour, as from enjoying this estate. And tho' the jury find him to be lord *Charles*, that is nothing: For if they find, in the same verdict, a fact that makes him not to

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be *lord*, then calling him so shall not be of any effect. I can't compare this case to any one more like, than that of a settlement made to several uses, with a power of revocation; when any one of the uses is revoked, the estate must go on to the others, as if that use had never been appointed. This act of parliament is a revocation of that use; and if so, it must go as if that use had not been limited. So if a use be limited to *A.* for life, then to *B.* for life, then to *C.* upon condition; if that condition is never performed, the estate must go to the other uses: And so here, the dutchiefs will take as heir-general, in case *Charles* and *Philip* did not perform the conditions, in order to vest the estate; and that the jury find they did not.

The second point is, that the statute of the first of *K. James* is not repealed by any subsequent statute, either in express words; or by necessary implication: If it be repealed, it will be pretended to be repealed, either by the statute of the third of king *James*, or the third of king *Charles*. It would be difficult to imagine that the same parliament, which in the first year of king *James* made this disabling act, should in the third year repeal it; especially if we consider what passed in the mean time, namely, the statute which makes an anniversary of the 5th of *November*. But we think, as there are no words that repeal it, so there are no inconsistencies between the two acts; but they stand well together, and have their different effects. The statute of the first year is the single statute that puts a disability to inherit, where the estate was not vested. That of the *third* is for prohibiting any from travelling beyond sea, without licence, upon pain of forfeiting their estates to the next protestant heir. Now those stand together; the latter statute only refers to their going beyond sea *without licence*: And if this should repeal the former, what would be the consequence? Instead of erecting a bulwark against popery, here is a gate opened for it. For suppose he has a licence to go beyond sea, and goes into a seminary; he is then under no disability, and can't be punished by the latter statute, because he had a licence; so that if the first be repealed, then there is no disability. The former act relates only to such as shall be sent into a seminary, to be strengthened in the popish religion; in that case the sender forfeits 100*l.* and he that is sent is disabled.

The statute of 3 *Jac. cap. 5.* says, "That if the children of any subject within this realm (the said children not being mariners, merchants, or their apprentices or factors) to prevent their good education in *England*, or for any other cause, shall hereafter be sent or go beyond the seas, without the licence of the king's majesty, or six of his honourable privy council (whereof the principal secretary to be one) under their hands and seals, that then all and every such child and children so sent, or

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which shall go beyond the seas, shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any lands, tenements, hereditaments, leases, goods or chattels, until he or they, being of the age of eighteen years or above, take the oath mentioned in an act of parliament made this present session, intituled, 'An act for the better discovering and repressing of popish recusants,' before some justice of the peace in the county, liberty, or place, where such parents of such children as shall be so sent, did or shall inhabit or dwell: And that in the mean time, the next of his or her kin, who shall be no popish recusant, shall have and enjoy the same lands, tenements, hereditaments, leases, goods and chattels, so given, conveyed, descended or devised, until such time as the person so sent or gone beyond the seas, shall confirm himself or herself, and take the aforesaid oath, and receive the sacrament of the Lord's Supper."

By the latter statute nothing is forfeited, if there be a *licence* to go beyond sea. By the former statute, notwithstanding a licence, they incur a disability. By the latter they forfeit what is vested in them; but there is no incapacity to hinder the vesting. The former statute seems chiefly to prevent an education in popish seminaries: But the other is calculated to prevent all persons from going beyond seas, without licence; which is grounded on this presumption, that if they do go beyond sea, they will imbibe those principles, which will render them dangerous to the government: So that both statutes stand very well together.

In *Foster's case*, 11 Co. 56. and in *Roll. Rep.* it is laid down for a rule, that whenever two statutes may stand together, such construction shall be made of them, as to make them consistent.

The other statute is 3 Car. c. 2. And if the act of first of king *James* was once repealed, yet it is revived again by this act. The words are, "forasmuch as divers ill affected persons, &c."

If the first of king *James* had been once repealed, this act will revive it again. Nay the parliament had such an eye to the act of the first year, that they took no notice of that of the third. That they found might easily be eluded: It was easy to pretend to be a sailor, or to trade a little, and then he is a merchant; and may go abroad into a seminary, and there is no sort of forfeiture.

Tredway's case was urged at the trial, as an authority against us: Therefore we must give some answer to it. First, as to the authority of that case, it was in the Court of Wards; three judges were there, two of whom were of the same opinion, and the other differed. But if you take the facts, as they are there stated, it may be difficult to support that case. In that case the statute

statute of the first of king *James* is not mentioned, but it stands upon the third. And the reason was, because if there was a disability in the sister from inheriting, and the crown had insisted on that statute, then the title of the crown had been out. And the other side did not insist on that statute; because they were the next protestant heirs, and so were safe upon it. In that case it appears, that *Letitia* was a nun professed in *Doway*, tho' it don't appear when she was professed. She was as if dead. But they say, how will you try that profession? The courts here can't write to those religious houses. True! But it was admitted she *was* profest. That case, however, of *Tredway* don't come up to ours; for first, it relates to an estate which was vested; but we rely on the first of king *James*, that prevents the vesting: Nay, in *Tredway's* case, the estate was held *in capite*; and it was said, that if it had been a common case, the next sister might have entered presently.

The third point is, that the common recovery, and the lease and release found to be executed by *Charles*, have no effect to bar the dutchess's reversion.

This point, in a great measure, depends on what is said before; for if *Charles*, the son of *Richard*, had nothing in the lands, then he could make no tenant to the *præcipe*: If he had nothing, he could convey nothing. If the statute disables him from giving, then consider how the tenant to the *præcipe* is made. It is by bargain and sale inrolled. Now a bargain and sale is a conveyance, that don't work a tort: Nothing passes by it, but what may lawfully pass; and if he had no estate in him, his tenant to the *præcipe* could not be good. Now as by the statute of the first of king *James* nothing can vest, let us see how it will be by the third of king *James*. By that statute the estate goes to the next of kin, and that must be a freehold determinable on the life of *Charles*. If it be vested in the next of kin, he is neither tenant to the *præcipe*, nor joins in making him.

That the next of kin must have a freehold is plain. For it can't be said that he has an estate *at will*; and that *Charles*, by his conforming, might have destroyed it: He is no more tenant at will than a mortgagee, because the mortgagor may destroy his estate by paying the money. Neither can he be said to have an estate *for years*, since then it must be certain how long that term may continue; not how long it *must*, but how long it *may*, continue. If then it can't be an estate at will or for years, it must be for life. I ground this supposition that we were on the statute of 3 *Jac.* The second recovery of the lands that were in jointure is much upon the same footing; for the tenant to the *præcipe* there is not made by any tortious act, by feoffment or fine; but by lease and release, which can pass nothing but what may lawfully pass. It is not found, that by virtue of the bar-

gain and sale, or the lease and release, the bargainee or lessee entered, or were possessed. It is a question, whether *Charles* could make a disseisin; for the act says, he shall not *take* any estate, and a disseisin is *taking* an estate. He may indeed be a trespasser, but he can't do any tortious act that shall make a disseisin. The tenant being thus made, here is a writ of entry brought against such as are not tenants; and they vouch *Charles* lord *Gerrard*. Now there is no such person in being, for the act of parliament has disabled him. When neither the party vouched, nor the tenant to the *præcipe* had any thing in them, the recovery must be bad. After a great length of time, the court will presume a tenant. But where several deeds are produced, which are insisted upon to have made a tenant, if they do not make a good tenant, the court will never presume another.

They themselves seem to yield up this point of the recovery; for if that had been good, and the estate (as they have found it) declared to these uses, no doubt Mr. *Fleetwood* would have a good title. But the jury doubt, and therefore, in their verdict, look for the next protestant heir, and that is said to be Mr. *Owen*. This, however, is a point I shall speak to, whether it shall be *jure representationis* or *jure propinquitatis*; for *jure representationis* the dutchess is the next heir.

The last point is as to *Philip*, that nothing vests in him. This will depend on what has been said before; for tho' *Philip* be alive, yet the jury have found a good title, because he is disabled to take: And if nothing did vest, he could forfeit nothing to the next protestant heir. Besides, tho' it is found that Mr. *Owen* is the next protestant kin to *Philip*, yet it is not found that he was next of kin at the time when *Charles* died. Now if the estate vests in the next of kin, and he dies, it can't go to the next after him; for it is an interest vested in him, that was next of kin at that time. And it is not found that he was next of kin when *Charles* died.

This being the case, that nothing vested in *Charles*, the recovery can't be good to bar the remainder; for if it should bar, it would be upon a notion that something vested.

But it is said, tho' he can't take, in respect of himself, yet he may take in respect of his heir. This is strange to think, that he took so much, as to enable him to destroy the estate that his heir is to claim thro' him; for there is no attainder. But he can't take so much as to enable him to bar the remainder that is in the dutchess.

Serj. Pengelly

We hope there is no title found for the lessor of the plaintiff. What is insisted on, that we have endeavoured to find a title, is nothing; for we were in possession, and therefore it is incumbent on them to make out a title. Their entry on us signifies nothing, unless they had a right: And tho' he says, we seem to waive

waive the former part of our defence, that is nothing; for the defendant insists upon every thing that may arise to defend his possession.

As to what *he* admits, it goes a great way in this case; that is, that an estate shall descend thro' *Charles* and *Philip*. If that be so, I know not how the lessor of the plaintiff can have a title in reversion; for where a man has an estate, and can transmit it, that estate must continue in him, and he in reversion can have nothing at that time: And he that has an estate tail, has the whole inheritance in him, and therefore must have a right to suffer a recovery.

I apprehend the act of king *Charles* will be most material in this case; yet I will endeavour to shew, that by the first of king *James* the whole inheritance vested in lord *Charles*; that the disability is only personal and temporary, and goes no further than to give away the profits during the time of his nonconformity; and that such constructions are always made on these statutes.

The counsel on the other side leave out half of this act of parliament, and argue only on one part, and that is, to be a total disability: But if it were so, it would be impossible they should transmit any thing. The words of the act are, That they shall be disabled *in respect of him or herself ONLY, but not to or in respect of any of their heirs or posterity*. It is plain then that the first punishment was only designed to be temporary and personal, and no disability goes to the issue or heir: For the parliament, to prevent any inconveniency that might happen from general words, and to shew the heirs were to come in, adds these words, '*Not to or in respect of his heirs or posterity*.' But by the construction on the other side, this clause for the heirs is quite excluded. There was one point insisted on at the trial, that they do not now mention; namely, that *Charles* and *Philip* being disabled, the estate was transferred to *Joseph*, he being a brother and a person capable to take; and that *Joseph* dying without issue, the estate came to the *dutchess*: But that destroys the pretence of it's coming to the *dutchess*; for he being a party capable to take, and the act not destroying the title of those who come under him, they claim *paramount* the *dutchess*.

On the statute of the first of king *James*, I observe that there is no disposition made of the lands to the crown, or any other person; whereas by the statute of 6 *Ricb.* 2. there was a direction, that the next of blood should immediately have title: Whence I infer, that when the parliament intends to take away the estate intirely, they direct to whom it shall go; because they must found their title on such act of parliament, and can't found it upon the common law. And tho' at that time acts of parliament were drawn more concisely, yet if that act were to be drawn out to a proper length, it would make this case

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pretty plain. The act says, he shall be incapable to take with respect to himself, *but not for his heirs*; therefore, to read in that manner, it enacts, That he who shall go beyond seas, &c. shall be incapable, with respect to himself, but with respect to his heirs or posterity he shall not be made incapable; for the clause, with respect to his heirs or posterity, goes through the whole act of parliament.

I take it to be a rule, in the exposition of acts of parliament, that disabilities, which are only temporary and personal, don't remove the estate out of the person, but only suspend the perception of the profits; for the estate descends from them to the issue: And it is not like the case of an *attainder*, which imposes an entire disability, and where as the person attainted can take nothing himself, so nothing can go from him. Tenant in tail or in fee is disabled during his nonconformity, or during his life; but still the greatest part of his estate is untouched, and all that remains, unless it be given to somebody else, remains in him, to descend to his heirs. It follows then of necessity, that his estate must vest in and descend from him; for unless it vests in it cannot descend from him; and by that construction, the penalty would be carried to persons who, by the act of parliament, are intended to be saved: For if there be a total disability, then the heir, who is to claim afterwards, is deprived of his claim; because the act don't give him any *new* title, nor any restitution or remedy to recover, but by his former title: Then of course, if he has no *new* title, and the old one is taken away, the heir is deprived of his estate: And yet these words are put in, on purpose to prevent any hard construction of the word *disability*.

In 1 *Inst.* 292, 293. it is agreed by my lord *Coke*, that if tenant in tail has issue two sons, one *before* his pardon, the other *after*, and dies; nothing can descend to the younger, for that the eldest is living and disabled; *but if the eldest had died in the life of the father, the estate would have come to the younger, per formam doni.*

The statute has made this distinction, that a person may be disabled to some purposes, as to the perception of profits, and yet he shall take for the benefit of his issue; and the case of the lord *Delawar*, 11 *Car.* fully proves it: The eldest son, in the life-time of his father, by act of parliament, 3 *Edw.* 6. was disabled, *during his life*, from claiming or enjoying any dignity, honour or estate, by descent or otherwise. So that there are as full words in that act as in this: And there was a determined set time for which this disability should be. After the death of lord *De'awar*, his son was called *William West*, Esq; till the latter end of queen *Elizabeth's* reign; because the act disabled him *totally during his life*: And tho' he was afterwards called to the

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House of Lords by a new writ, yet, upon his death, his son prayed to be admitted, according to the dignity of the family: And it was agreed, that the estate in dignity was all along in *William West*; for although the exercise of it was interrupted, being but a temporary suspension, it continued in him, and his heirs should claim it as descending from him. It was objected in that case, that, the father being disabled, the son could not claim under him: But the difference was taken between an *absolute* disability, by the corruption of blood, and what was only *personal* and *temporary*; and this distinction is agreed in 1 *Vent.* 416. 2 *Roll.* 418.

It is necessary that the act should have this construction, otherwise the proviso, which is for his benefit on conformity, would be void. It is called on the other side a condition precedent; but I take it only to be a condition, in order to be restored to the perception of the profits. In the proviso there are no words of restitution, but only that upon his conformity he shall be capable: There being no words of restitution, shews that the estate was not out of him: Therefore I take it, the meaning of this act is, that he shall be disabled only as to the benefit of his estate.

The statute of the third of king *James* includes every offence contained in the former; but the former being silent, as to the disposition of the estate, that affords some reason why the third of that king was made. By the first of king *James*, I take it, the king was to have the profits; for there being no private person mentioned, and it being no offence against a private person, it must go to the crown. Now the act of the third of K. *James* don't alter the penalty, but ascertains the person who is to enjoy the benefit of it; and says, 'That all lands, &c. so given, shall be enjoyed by the next of kin, who shall be no recusant.' This act shews that *he* takes the estate, tho' the next of kin shall have the profits; and these words in the act don't carry any estate of freehold to the next of kin, for the next of kin shall account to him that was disabled, in case of conformity. So again, in this act of parliament, there is no clause of restitution as to the *lands*; but as to the *goods and chattels*, which are forfeited, there is an express clause of restitution.

In the case of *Tredway*, [determined by *Mountague* and *Hobart*, and confirmed in 1 *Keble* 263.] it is agreed, that the next of kin had nothing but the pernancy of the profits; and *Twisdal* said, that the conformity of the person determined the perception of the profits: And the statute of king *Charles* I. confirms the idea, that the estate was not taken out of the recusant; because it is said, he shall forfeit his estate of freehold *during his life*. In that statute, there is no new offence mentioned, but only that of being educated in a private family; and yet, by that statute, his

estate of freehold *during his life* shall be forfeited: So that here is a different forfeiture imposed for the same crimes as are mentioned in the 3d of King *James*. That act gave the profits to the next of kin; and this act, to prevent any favour in the next of kin, gives it to him *for life, and without any account.*

In the case of issue in tail, there ought to be stronger words to carry an estate *from* them, than in the case of an estate in fee simple; because the issue in tail claims under an act of parliament: And therefore though an act of parliament imposes a forfeiture of lands and tenements, yet in the case of an estate tail, tenant in tail forfeits for life only; and the estate shall go afterwards to the issue in tail. And therefore it is agreed that the acts of 27 *Ed. 3.* and 27 *Ed. 3.* shall not repeal the statute *de donis*, and there being no express words to give away the estate tail, it must remain in the recusant.

It has been insisted that *Charles* and *Philip* are looked upon as persons not in being; but that is different from the words of the act; for the act takes care of them, if they conform, by directing that they shall have their estate again to all intents and purposes; and it also makes a provision for their *heirs* and posterity.

As to what is objected, that by the 1st of King *James* the estate can't go to the crown, because nothing can be forfeited to the crown but what was vested; it is a rule that when any thing is given away from the person, and not given over to any other, it must go to the crown; and that is agreed in 2 *Vent.* 267. 269. 2 *Inst.* 646.

There is another reason why they can never pretend to enter, — for by this act of parliament, whatever punishment was on *Charles*, it was only to his own interest; and *Philip* could not be affected during his life: *Philip* is still living and may conform, so that whilst he is living, they can't pretend to take any advantage of the disability that was in *Charles*. *Hob.* 45. *Philip's* interest could not commence till the death of *Charles*, without issue; for this act could have no influence on *Philip* during the life of *Charles*, as the estate continued in *Charles* for the benefit of those who were to come after him: So, he being dead, all his disabilities are gone with him, and they can't claim any thing by reason of any disability in him.

If the estate continued in *Charles*, then I may infer, first, that the recovery was good; for if the estate tail was in him, it would have been good, if he had been tenant to the *præcipe*. But if he had only a right to the estate, still he comes in as vouchee, and therefore it is a good recovery, there being a good tenant to the *præcipe*. And *Charles* entering upon the death of lord *Digby*, and taking upon him to dispose of the whole estate, it must be a disclaimer to him that had right; though if he had

made a lease for years or any less estate, it might be a disseisin or not at election. 3 Co. 58.

It is said he could not be a disseisor, for that by the act he was under such a disability, that he could not take a freehold: Then, by consequence, the act has taken away the estate of those, who are under no disability; for there was no body against whom there could be an assise brought. If a monk who is disabled enters into the lands of another, he is a disseisor; and the freehold vests in him. 12 H. 4. 17. Bro. Abr.

But suppose the recovery was not well suffered, yet the dutchess can't enter as in her reversion; for though the person that had an estate tail is disabled, yet the reversioner cannot enter, but there is a right in the tenant during his whole life, and there shall be an occupant. Plow. 557, 558. 1 Inst. 28. b. So where an estate tail is barred by fine, and cannot descend to the issue in tail, yet it shall have such an existence, that the reversioner shall not enter during the life of the tenant in tail.

Now I shall shew, by the statute of the 3d of King James, and of the 3d of King Charles, that the 1st of King James is out of the case. The statute of the 3d of King James makes a disposition of the enjoyment of the forfeiture, different from that of the first; for if the crown, under the first, had a right to take the profits, when the 3d of King James gives them to another, that must determine the interest which would be claimed under the first of King James: And that was admitted in *Tredway's case*, and in *Cottingham's case*. But the statute of the 3d of King Charles, goes further to discharge the 1st of King James, as it gives a different estate, which can't vest but upon a subsequent act; directs a different punishment, and different prosecution; and gives the forfeiture to a different person. Unless that act therefore doth repeal the former, the recusant will be liable to these different punishments, which will be inconsistent one with the other; and one shall have the profits, and the other the freehold.

The question was stated, whether the estate should go to him that was next of kin *jure propinquitatis*, or *jure representationis*; and it was said, Owen was one degree nearer than the dutchess, which I agree; and it has been already adjudged, that it shall go to the next in relationship, in *Crawley's law* against recusants, which I mention not as an authority, only as it is a collection of those authorities that have been adjudged in these points. 1 Inst. 10. 8. 3 Co. 39, 40, 41.

I hope I have shewn, that the estate continued in Charles, and that his recovery is good; that there is an estate in Philip, which defeats the title in reversion; and that if the estate descends to the next of kin, there is one nearer than the dutchess.

I lay this down as a rule, that the 1st of King James is the only statute that hinders an estate from vesting: The statutes of the

Serj. Hooper
in reply.

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the 3d of King *James* and the 3d of *Charles*, relate to estates vested. As to estates vested, I allow they must go as these statutes direct, but neither of them relates to estates not vested. A roman catholic may have an estate vested before he goes beyond sea, and these two statutes still have their effect. But as to estates not vested, there is nothing, by the 1st of King *James*, that stands in force; which I take to be an answer to all the cases that have been cited. *Philip* is as much disabled as *Charles*, because the same disability is found in him. To the recovery, in all cases, there must be a good tenant to the *præcipe*; and it is impossible that *Charles* should make one.

The above is the substance of the first argument of this case, by Serj. *Hooper* for the plaintiff, and Serj. *Pengelly* for the defendant, in *Trinity* term 11 *Annæ*. In *Michaelmas* term following it was argued again, by Serj. *Pratt* for the plaintiff, and Serj. *Selby* for the defendant, as follows:

Serj. *Pratt*.

In this case I shall shew first, that the recovery suffered by *Charles* lord *Gerrard* is void, and can't bar the remainder limited to the right heirs of lord *Charles*. And secondly, That tho' *Philip*, who is the heir male of *Thomas*, is still alive, yet that is no impediment to prevent the lessors of the plaintiff from recovering.

To make out the first point, I beg leave to observe, that the estate tail limited to the heirs males of the body of *Thomas* lord *Gerrard*, was during the life of *Digby* lord *Gerrard* vested in him; and could not vest in *Charles* till after his death. And secondly, That before the death of *Digby*, the last *Charles* lord *Gerrard* is found, in the words of the 1st of King *James*, to have been sent into parts beyond sea; to be educated in the popish religion. Hence it will follow, that he became disabled to take the estate; and that disability being never removed during his life-time, the estate tail never vested in him.

The words of the act are these, "Shall be in respect of himself only, and not to or in respect of his heirs or any of his posterity, utterly disabled and incapable to inherit, have or enjoy any manors, lands, tenements, hereditaments, goods, chattels, debts, &c."

These are the words of the act; and the last *Charles* lord *Gerrard* being found to have incurred this disability, the estate tail never vested in him; so that he was incapable to suffer a recovery. If the latter words of this clause were out of the case, there could be no doubt, but, by incurring that disability, the estate would have been prevented from vesting in him; and then he coming in as vouchee, could not bar the remainder: for though in some cases, a person, who is under a legal disability to hold an estate to his own use, may however, by act conveyance or agreement of the party, purchase an estate for the benefit of others; yet the law never will cast an estate upon one, who is incapable

to hold it for his own benefit. *Co. Lit. fo. 2.* If a man attainted or an alien purchase an estate, the crown shall have it; but in neither of these cases, if the party be disabled in the time of his ancestor, will the law cast the estate upon him, but it will go to him who is next able to take. *Co. Lit. fo. 8. 1 Vent. 413.* These are cases of disability at common law; but the case before you, being by virtue of an act of parliament, is much stronger: For in this case he can't purchase for the benefit of the crown, since, by the words of the act, all estates, &c. shall be utterly void and of none effect, to all intents and purposes; which is the fullest intimation imaginable, that the parliament intended they should take no estate: Nay, they can't take chattels, debts, duties, or sums of money.

But it is insisted, that, however the law would have been in case those words were to be rejected, yet there being those words, "*in respect of him or herself only, and not to or in respect of any of his heirs or posterity,*" these words have qualified the others; so that, for the sake of posterity, an estate shall vest in the ancestor: And it has been said, that these words would signify nothing, if an estate did not vest in the ancestor; and that the issue can't take, if the estate did not first vest in the ancestor.

To which I answer, that this disability, being only *temporary*, would not have been a disability to the heir, in case these words had not been in the act. *Collingwood and Dace.* If a man be attainted of treason, he is not only disabled to take by descent, but no body can take by or under him, though he were dead. But where the disability is *personal* and *temporary*, there the heir or the issue may take, notwithstanding such a temporary disability. And that is the difference taken by my lord Hale; he lays it down as a *postulatum*, that where the ancestor is seised, and the heir at law is under an absolute disability, the law will not cast the estate upon him; but where it is only *temporary* it is otherwise. Lord Delaware's case. *Co. 1.* The case was, the lord Delaware was disabled to have claim or enjoy by descent *during his life*; in that case it was agreed, That he, being under such a disability, was not a baron during his life, but only an esquire; yet it was resolved, that, it being only *temporary*, his heir should claim under him. The disability in this case is more personal and temporary; for that was during his life; but this is only during the pleasure of the party, for on his conformity he is to be discharged from that disability; and being so, if these cases be law, this disability would not have inferred a disability on the heir, if there had not been this clause in the act of parliament.

It may be said, what then is the meaning of the act of parliament in these words?

I answer, these words are only declaratory of the law, and to remove a doubt that might otherwise have arisen, on the autho-

rity of other cases, of a total disability. They might think, that some doubt might arise upon those cases; and therefore they provided expressly, that he should be disabled as to himself only.

It has been said, that it is impossible for the issue to take, unless the ancestor be seised; for the issue must take by descent; and that cannot be unless the ancestor be seised; and therefore he must be seised for the benefit of his posterity.

In answer to this, it is not necessary that the ancestor should be seised, to entitle the heir to take by descent. So is *Shelly's* case, and a multitude of authorities there cited. A man covenants to suffer a recovery to the use of *J. S.* and the heir male of his body; and it is suffered accordingly; but, before it is executed, *J. S.* dies: The question was, how the heir male of the body should claim; and it was resolved in that case, that though the ancestor was not seised, yet, since by possibility he might have been seised, the heir should claim by descent and not by purchase: And it is laid down as a rule, that wherever the ancestor might have been seised, the heir shall take by descent, though the ancestor was not actually seised. In *Co. Lit.* 378. a case is put, where the heir shall take by descent, though the ancestor could never have been seised; as if land be given to *A.* and *B.* so long as they jointly live, the remainder to the right heir of him that dieth first; in this case, the ancestor could never have an estate of inheritance in him, yet the heir shall take by descent.

This case, being of a temporary disability by *act of parliament*, is stronger than any case at *common law*. It being provided that this disability shall not affect the posterity, the right of descent is saved to the issue, though the ancestor was not seised; but the case of the lord *Delawar* is not so strong, because there was no saving to the issue in that case.

They insist upon it, that the words of the act are with them; viz. "*that he shall be disabled as to himself ONLY.*" I must observe, that in a *literal sense* the act can never be complied with, for it is impossible, that a person at the same time should be both capable and incapable; and the parliament cannot make two contradictory propositions to be true: Therefore it must admit of a *reasonable construction*; and that is, that although the ancestor be disabled from taking, yet there should be the same effect, for the benefit of the heir, as if the ancestor had taken: And this makes all the parts consistent. Now this must be by a fiction in the law, of which there are many instances to be given. *Butler* and *Baker's* case. The ancestor of the husband settles upon the husband and wife, for the wife's jointure: afterwards he disposes of good part of the estate by will; and the wife, after the death of the husband, disagrees to the settlement. The question was (this disagreement being after the death of the husband, so that at the time of his death the lands were not immediately to descend to his

his heir) whether it should not be *supposed* that he was seised; so that the lands should descend to his heir after his death? And though it was not denied, but that the woman had at that time an estate in her, yet, by a necessary relation and to justify the act of parliament of devises, it was said, that the husband should be adjudged to die seised of the lands. So in the case of a fraudulent conveyance, if a man make a fraudulent conveyance, the estate does pass out of the person who made the conveyance, and vest in him to whom the conveyance is made; but if after this, he should make a new conveyance to a *bonâ fide* purchaser, the law will suppose that he continued seised to the time of the second conveyance.

Upon the construction they contend for, what a strange act would this be? For the act of parliament has provided, that the party should be disabled *as to himself*; and they admit he shall have no benefit by the estate; but if this construction be right, the party will be enabled to suffer a recovery; and if he may suffer a recovery, he may declare the uses of it. He may sell; and if he may sell, he may put the money in his pocket. So that the party, intended to be prevented from taking any benefit, by this construction is to have all the benefit that can be made of it.

Again, the act of parliament by these words, "*not to or for his heirs or posterity*," intended to provide for posterity, that they should not be hurt by the disability of the ancestor: The parliament intended to put it out of the power of the ancestor to hurt the posterity; and yet, by this construction, it is in the power of a *popish* ancestor to bar a *protestant* heir.

It has been objected, That it was the intent of this act, that the party incurring the disability might be restored, on his conformity; and there being no words of restitution in the act, therefore the estate was in him before.

In answer to this, It don't appear, that it was the intent of the parliament to restore the estate to him, if he continued so long in his nonconformity, that the estate was gone over to any other person. The words are, that "*if he conform, during the time of his continuance in such conformity, he shall be FREED and DISCHARGED of such disability*." All that those words import is, that during the time of his conformity he shall be freed from the disability: that is, he shall be able from that time to take by descent. The party was under a disability before his conformity: Lands could not descend to him; nor could he purchase lands: But if, by reason of the non-conformity, lands that ought to have descended to him were gone over to another, it was not the intent that the estate, which was vested in another, should revert in him. This would be so far from preventing the growth of popery, that it would encourage people to persist in their non-conformity; for if they might stay till they had suffered by it, and then be restored,

no body would conform in time ; but otherwise they would conform in time, to prevent their disability. Therefore this is a just and reasonable construction. In ordinary conveyances, estates are to be governed by the rules of the common law ; therefore when any estate goes over to another person, it can't be revested. But an act of parliament may make an estate to vest and revest at pleasure : And that will appear in the *Prince's case*, 8 *Rep.* whereby it appears what a power an act of parliament has. And though there be no words of restitution in this case, yet if the intent of the parliament appears, though the words are not so full, the court will make a reasonable construction.

From what has been offered it appears, that *Charles lord Gerrard* being under a disability to inherit by virtue of this act, no estate did or could vest in him ; and by consequence the recovery suffered is void, and the remainder to the right heirs of *Charles lord Gerrard* vests in the dutchess of *Hamilton*, unless the life of *Philip* does prevent it. Therefore this is the next point to be considered, whether *Philip* being still alive is or can be any impediment to hinder that remainder from taking possession.

It is insisted, that during his life, the estate tail is not determined ; and at any time, upon his conformity, he will be entitled : Therefore that the estate tail to some purposes is to have a continuance. To which I answer, that, by the rules of law, wherever the person is incapable at the time when the lands ought to vest, they must go over to the next who is entitled. If lands be limited for life to *A.* remainder to the heirs of *B.* ; if *B.* be living at the time of the death of *A.* the estate will escheat. *Fuller and Fuller, Cro. Eliz. 422.* In that case there was a diversity in the opinion of the court, whether the issue in tail was prevented from taking ; and hence they took into consideration what should become of the estate : It was insisted, on of the one side, that it should go to the heir at law, since the remainder-man was not to take but upon default of the heirs of the body ; but it was resolved, the estate should not go to the heir at law, but to the remainder-man. If lands be given to *A.* who is a monk for life, with remainder to *B.* the question is what shall become of the estate ? *B.* by the intent of the will, was not to take till the first devisee was dead ; therefore one would have thought, it should go to the heir till the death of the monk ; but it was resolved that the remainder-man should take it, as if the monk were naturally dead. 2 *Roll. Abr. 415.* A man seised in fee dies, leaving two sons ; the first an alien, the second a natural born subject : The alien can't take, but the natural born subject shall ; because the alien could never inherit, and therefore can't hinder the second son from taking. If he had only one son an alien, and that alien had a son a natural born subject ; the son being to claim under his father, neither of them can take. If a man be attainted, and his father dies seised, the son can't take, but it shall

shall go to the crown. In the case of *Collingwood* and *Dace*, these cases are all taken for law.

Some cases have been cited on the other side, to prove that during the continuance of the estate tail, tho' the person to take be under a disability, the estate shall not go over. In the case of a fine levied by tenant in tail, the tenant in tail is under a disability to take the estate; and yet, though he be so, the estate shall not go over to the remainder-man, but to the cognizee. The answer to this is plain, that is, by the express provision of 4 H. 7. 32. 34 H. 8.

The next thing insisted on is, that where tenant in tail is attainted of treason, the crown shall enjoy as long as there is issue of his body. At common law, the person attainted could forfeit only for his life; but 26 H. 8. has provided, that the ancestor shall forfeit the whole estate tail.

Another thing insisted on is, that where a man sells an office, within the stat. 5 & 6 Ed. 6. it is a forfeiture, and all forfeitures go to the crown, unless they are otherwise disposed of. 2 Ventr. 267. *Woodward v. Fox*. But in that case it is agreed, that if a man has an inheritance in an office, and he grants it for life, and the grantee forfeits, the King shall not in that case dispose of it; but he that has the inheritance.

Upon the whole I submit, whether the last *Charles* lord *Gerrard* being disabled to take the estate, any estate did or could vest in him? Whether the recovery, in which he was vouchee, was not void? Whether, during his life, the crown was or could be entitled to the estate, it being neither forfeited nor given to the crown? Whether the freehold could be in abeyance during the life of *Charles* lord *Gerrard*? And lastly, Whether, as a consequence from all this, the remainder, limited to the right heir of *Thomas* lord *Gerrard*, did not vest in the present dutchess of *Hamilton*.

It has been further insisted, that whatever the construction of 1 Jac. might have been, yet this act is altered by 3 Jac. or 3 Car. But those acts upon consideration will be found not to affect this.

There is no pretence to say it is altered by 3 Jac. The offence to be punished by this act is a new offence, and not the same that is intended in 1 Jac. The offence in 1 Jac. is going beyond sea, *with intent to go into a popish seminary*; and there the intent makes the offence: But 3 Jac. is different; for there it is provided that, if any person go beyond sea, *for any intent whatsoever*, if he go without licence he shall incur the penalty of that act. So that a man may be guilty of a breach of 3 Jac. and not of 1 Jac.; for if he go without licence on any intent whatsoever, he may be guilty of a breach of 3 Jac.: But if he go without licence, if he go not with intent to enter into a popish seminary, he is not guilty of a breach of 1 Jac. So a man may be guilty

of a breach of the 1st and not of the 3d; as if a man have a licence to go beyond sea, and he goes with that intent and purpose. I would admit, that the design of the first act and the other is the same: That the 3 Jac. designs as the *ultimatum*, to prevent children from being sent beyond sea, to be perverted; and so was the intent of the 1st of James. But the *reason* of making 3 Jac. was because of the difficulty of proving the *intent* of persons, sending their children beyond sea; therefore the last act was made to prevent their sending them without licence. The punishment of the first act is, that they shall be disabled to take by descent or purchase; and the punishment of the second is, that the party shall take no benefit by descent or purchase, but the next protestant heir shall have the profits; being reconciled however, he shall be restored, and have an account of the profits. The offence of going beyond sea without licence, is an offence of a less nature; but the other is an offence of a great nature, and therefore the offender is punished in a greater degree; the party is under a disability, and never to be restored to the profits of his estate. They would have it, that the construction should be the same of both acts of parliament; that the disability in the first, to take by descent or purchase, is the same with that in the third, which says he shall take no benefit by descent or purchase. But it is a strong argument, that both acts being made by the same parliament, and but two years distant from each other; if they had meant the same thing, they would have said it in the same words, unless they were dissatisfied with the words, or did not think them proper: But no such thing appears, and therefore it must be taken, that they intended a different crime and punishment.

The next thing insisted on is, that the act of Charles has altered the 1st of James. But I take it there is no reason to vary the construction of 1 Jac. but that of the 3 Car. The preamble of that act says, *Forasmuch as divers ill affected persons, &c. notwithstanding the restraint thereof by the statute made in the first year of the reign of our sovereign lord king James, &c.* This preamble is so far from a design of altering the first statute, that it complains that divers persons still transgress that law: It is so far from shewing that the parliament was dissatisfied with 1 Jac. that they take notice, that it had not its due effects. But the provision of this act goes further, "*Be it enacted, that the said statute shall be put in due execution;*" Can it be said then that they intended to relapse that act, when they direct it shall be put in due execution? Rather, if any thing of 1 Jac. had been altered by 3 Jac. this act has set it up again.

Upon the whole matter, I hope it appears, first, that Charles lord Gerrard was under a disability to take the estate; and therefore it did not vest in him. If so, then his coming in as vouchee could not bar the remainder. Secondly, that Philip's disability

as effectually bars him from taking the estate. Therefore by the rules of law, and all the authorities that have been cited, the estate does vest in the noble lady the dutchess of *Hamilton*. Lastly, the subsequent acts of parliament don't any ways alter or repeal the first of king *James*, but give it new life and vigour.

I apprehend a great deal has been said, that is foreign to the matter: And tho' many points have been made, yet the whole question is to be determined by this one; Whether the dutchess be entitled, by the determination of the estate tail? If not, this ejectment is not well brought. Or if she be well entitled to the legal estate, and not to the pertainancy of the profits, she can't recover. If a man is to enter for nonpayment of money, and to hold *quousque*, he that has the legal estate can't recover against him who is to take the profits. Serj. Selby.

It turns on this single point; Whether the lord *Charles* was barred from the legal estate, and from the profits during his non-conformity? And tho' a great deal has been said, I apprehend it is more from the *quality* of the person, and from the *quantity* of the estate, than from any real difficulty in the case. It is much, that in 100 years, it could not be found out, that the legal estate was to be recovered: But all that ever was pretended to, was the pertainancy of the profits; and this being the first time it ever was attempted, is some argument that the law is not so.

All we have to do, is to consider the three acts of parliament; and to see whether it could be the intention of the legislature, that the legal estate should not vest in the person so going or sent beyond sea: And it will plainly appear, it could not be their intention, by reason so many absurdities will arise upon such an exposition. The words *1 Jac.* are as express as if the parliament had foreseen this cause, that he shall be disabled *as to himself ONLY*, and not to or for his heirs or posterity. The act did not intend to prejudice the heirs in any respect; nor himself any longer than during his nonconformity: Therefore he shall be disabled in respect of himself only; that is, he shall not take or enjoy the rents, issues or profits of the estate; but he shall so take, that the issue or remainder-man shall make their title thro' him. The heir can't have the estate of his ancestor, unless his ancestor had it before him; nor can the heir in tail take the estate tail, but thro' his ancestor. So that it is impossible to put that construction upon the act; nor is there any occasion for it, but to gratify the present plaintiff.

It is objected, if the party has the estate, perhaps he may sell it. I know not whether he may or not. Admitting, however, that he may, the intention of the act will be answered; for the intent is, that the lands, which are the strength of the nation, should not be in the hands of the papists; but they never intended to take their money from them.

There

There is no way to make this act conformable to the rules of law, or indeed of sense, unless the estate does vest.

If the legal estate does vest, as it must, it is said he shall be disabled only during his nonconformity; what is to be done when he conforms? It is not said he shall have the estate again, but that the incapacity shall be removed; he shall be enabled to receive the rents and profits. The legal estate was not taken away before, nor are there any words whereby it is to be restored again, so that as it stands upon 1 *Jac.* the legal estate must vest.

And this is confirmed by 3 *Jac.* which I don't say is a repeal of 1 *Jac.* but it is an explanation of it. For tho' by 1 *Jac.* the party was not to receive the profits, yet there was no direction who should take them; therefore they must go to the crown: But the 3 *Jac.* makes a provision against other offences, and then disposes of what was not disposed of before, but by act of law, to the crown; and it provides, that the profits shall go to the next of kin. There is no offence in 1 *Jac.* which is not comprized in 3 *Jac.*; every one that offends against the first, must offend against the third, and therefore, the forfeitures for the offence in the first are disposed of by 3 *Jac.* and must go to the next of kin. If then, the dutchess be not the next of kin, she can't be entitled to the profits, and by consequence can't maintain this ejectment; for *Owen* is found to be next protestant of kin within the words of the act. If she is not entitled to the rents and profits, she is not entitled to the action; tho' she were entitled to the legal estate: So that take it one way or the other, she can't recover. *Philip* is also found to be alive, which will ease us of the consideration of the effects of the recovery; for if *Philip* be alive, then does the right of the estate tail remain in him: He is to have the profits, if he conforms; if he dies, his issue has a title: And till he is dead without issue, no remainder vests in the dutchess.

Serj. Pratt.

It has been said, that it is not an inconvenience intended to be prevented, to hinder the party from selling the estate, but only to keep him from the lands; but it was forgotten that the next words say, *they shall be disabled to take goods, chattels, money or debts:* So that it was the intent to hinder them from taking money, as well as lands; and then it would be strange to let them sell their lands, and turn them into money.

It has been said too, that every one who is guilty of an offence against 1 *Jac.* must also offend against 3 *Jac.* I deny that, for if a man go beyond sea with a licence, he perverts the intent of that licence, by going into a religious house; so that he may be guilty of an offence against 1 *Jac.* without offending against 3 *Jac.*

The last argument of this case in *C. B.* by Sir *Thomas Powis* for the plaintiff, and Serjeant *Chestyre* for the defendant, is in 10 *Mod.*

10 *Mod.* 113. Suffice it to say, that, upon these several arguments, the court of *C. B.* were unanimous in opinion for the defendant, and gave judgment accordingly. Upon this judgment a writ of error was brought in *B. R.* where the judges were divided in opinion: And from thence it was adjourned to the House of Lords, who affirmed the judgment of the court of *C. B.* The opinion of the court of *C. B.* and the subsequent arguments, with the opinions of the judges, in the court of *B. R.* are reported at length in *Str.* 318, &c. See also 10 *Mod.* 356, 406. And for the proceedings in the House of Lords, vide 2 *Br. Parl. Cas.* 203.

S U P P L E M E N T

OF ENTRIES, in Cases adjudged in the Reign of Queen *Ann.*

Regina v. Corporation de Bewdley.

Trin. 6 *Annæ reginæ*, in *B. R.*

A N N A Dei gratia Magnæ Britannia Franciæ et Hiberniæ regina, fidei defensor, &c. Vicecomiti Wigornia salutem: Præcipimus tibi, quod non omittas propter aliquam libertatem in ballivâ tuâ, quin venire facias in curiâ nostrâ coram nobis, in octab' Sanctæ Trinitatis ubicunque tunc fuerimus in Angliâ, duodecim liberos et legales homines de vicineto de Bewdiey in comitatu tuo, quorum quilibet habeat decem libras terrar' tenementorum vel redditum per annum ad minimum, per quos rei veritas melius scire poterit, ad recognizandum super sacramentum suum, (in quodam placito, super brevi nostro de *scire facias* per nos in curiâ nostrâ cancellariæ nuper impetrato, versus ballivum et burgenſes burgi de Bewdley, in comitatu Wigornia, moto et pendente,) utrûm Thomas Smith, in recordo illo nominatus, in officium ballivi burgi prædicti electus fuisset, modo et formâ prout ex parte nostrâ per prædictum

Venire facias
de vicineto.
Ante 100,
115.
Holt 353.
Salk. 694.
S. C. but not
S. P.

breve de scire facias allegatur; necne utrum tempore consecutionis literarum nostrarum patentium, in recordo illo specificat, fuerunt et existerunt ballivus et burgenses burgi de Bewdley prædicti, modo et formâ prout per breve illud supponitur; necne etiam utrum ballivi et burgenses burgi de Bewdley prædicti, in prædicto brevi de *scire facias* specificati, dictarum literarum patentium nostrarum accipere recusaverunt, modo et formâ prout per breve prædictum allegatur; necne etiam utrum prædicti ballivus et burgenses burgi prædicti, defendentes in placito prædicto, libertates franchises immunitates privilegios et jurisdictiones, in brevi prædicto mentionat, usurpaverunt, modo et formâ prout per breve illud supponitur; quia tam Edward Northey miles attornatus noster generalis ex parte nostrâ quam iidem ballivus et burgenses burgi prædicti, defendentes in placito, posuere se inde in juratam illam: Et habeas ibi tunc nomina juratorum, et hoc breve. Teste T. Parker milite apud Westmonasterium, septimo die Maii anno regni nostri undecimo.

Harcourt.

New trial.

This *venire facias* was argued divers times in B. R. and afterwards in Sergeant's-Inn-Hall before all the judges, upon the words, '*de vicineto de Bewdley*;' for it was objected, that it ought to have been '*duodecim, &c. de corpore comitatus*.' But the *venire facias* was held to be well awarded. And a new trial was granted, after a verdict for the queen upon each issue, on payment of costs; because the jury found a general verdict, when *per totam curiam* (*præter Powell qui dubitavit*) they ought to have found one of the issues *specialy*, being directed by the court so to do.

Note; If the *venire facias* had been ill awarded, the court would have granted a new trial without costs. And they seemed inclined to grant one without costs notwithstanding; because, in the case of the crown, there are no costs to be given by the crown on a new trial: *Ergo, pari ratione*, the crown ought to have no costs. And divers precedents were produced the last day of Michaelmas term 1712, of like rules in *scaccario*, of relators, &c.; but Powell being absent, the other judges would not reverse a rule, made when the court was full, which granted a new trial on payment of cost, *nisi, &c.* The court, however, enlarged the rule, till the first day of Hilary term *peremptorily*, when (they said) they should have considered the law on that point; and that if they should be of opinion for payment of costs, the same should be paid in three days after, or judgment should be for the queen upon the general verdict.

Curtis

Curtis v. Jermy.

Pasch. 11 Annæ reginæ, in B. R.

NORFOLK ff. In an action brought by *Robert Jermy* and *Sarah* his wife, as executrix of *Sarah Parker*, widow, the plaintiff declared on several *assumpsits*, *pro esculentis et poculentis*; *pro diversis summis extraposis et erogatis*; et *pro aliis summis expensis ad requisitionem defendentis ad damnum* 95*l.*; to which the defendant pleaded *non assumpsit*: And, at the *Norwich* summer assizes, before the lord chief baron *Ward* and justice *Eyre*, there was a verdict for the plaintiff, and 65*l.* damages. - On the 14th of *December* following judgment was signed; upon which a writ of error was brought, returnable the first day of *Michaelmas* term, 10 *Ann.* and the assignment of errors was as follows:

Postea scilicet die jovis proxime post tres septimanas sancti Michaelis, anno regni dominæ reginæ nunc undecimo, coram eadem dominâ reginâ apud Westmonasterium, venit prædictus Francus per Ed. Layton attornatum suum, et dicit quod in recordo et processu prædicti, necnon in redditione judicii prædicti, manifeste est erratum in hoc, videlicet, quod ubi per recordum prædictum apparet quod judicium prædictum redditum sit pro prædicti Roberto et Sarâ; ideo in eo manifestè est erratum: Erratum est etiam in hoc, videlicet, quod breve originale ipsorum Roberti et Saræ, in placito prædicto impetratum, et nunc in custodiâ custodis brevium dictæ dominæ reginæ de banco remanens et de recordo affilatum, impetratum fuit extra curiam Cancellariæ dictæ dominæ reginæ apud Westmonasterium, quarto die Junii anno regni dictæ dominæ reginæ nunc septimo, retornabile in prædictâ curiâ dictæ dominæ reginæ de banco, coram justiciariis ejusdem dominæ reginæ apud Westmonasterium, a die Sanctæ Trinitatis in tres septimanas tunc proxime sequent; quod quidem breve in se requirebat ipsum Francum, per nomen Franci Jermy nuper de Quinton in comitatu Norfolk generosi, quod esset coram justiciariis ejusdem dominæ reginæ apud Westmonasterium a die Sanctæ Trinitatis in tres septimanas prædicti, ostensurus quare vi et armis clausum ipsorum Roberti et Saræ, apud Quinton, fregisset, et alia enormia eis intulisset, ad grave damnum ipsorum Roberti et Saræ, et contra pacem dictæ dominæ reginæ; sed non pro causis in narratione prædictâ superius specificatis; prout per breve originale prædictum, de recordo in custodiâ prædicti custodis brevium dictæ dominæ reginæ de banco prædicto remanente, plenius liquet et apparet. Quodque placitum prædictum, et judicium prædictum superinde habitum

Assignment
of errors in
B. R. viz. an
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et obtentum, habiti et obtenti fuerunt super breve originale illud: Unde, ex quo breve prædictum non manenet narrationem prædictam superinde fundatam, idem Francus dicit quod breve originale prædictum minus sufficiens in lege existit; quodque narratio prædicta, materiaque in eadem, minus etiam sufficiens in lege existit, et non warrantizatum est per breve illud. Ideoque in illud manifeste est erratum. Et petit idem Francus breve dictæ dominæ reginæ præfate custodi brevium prædicti dirigendum, ad certificandum dictæ dominæ reginæ plenius inde veritas: Et ei conceditur, &c. Per quod præceptum est Henrico St. John baronetto, custodi brevium dictæ dominæ reginæ de banco prædicto, quod, scrutatis brevibus originalibus prædicti comitatus Norfolk, de termino prædicto Sanctæ Trinitatis anno septimo supradicto, sub custodia sua de recordo affilatis, quid de breve originali prædicto inter partes prædictas de placito prædicto invenit, dictæ dominæ reginæ indilate ubicunque &c. certificet, unacum brevi regis sibi inde directo, &c. Qui quidem Henricus St. John, virtute brevis prædicti sibi inde directi, dictæ dominæ reginæ apud Westmonasterium certificavit, quod virtute brevis prædicti sibi directi, scrutatis brevibus originalibus prædicti comitatus Norfolk, de termino et anno supradicti, in custodia sua de recordo affilatis, in eisdem invenit quoddam breve originale inter partes prædictas de placito prædicto, in custodia sua de termino prædicto affilatum; ut sequitur in hæc verba. 'Annâ Dei gratiâ, &c. Vicecomiti Norfolk salutem: Si Robertus Curtis generosus et Sara uxor ejus fecerint te fecurum de clamore suo prosequendo, tunc pone per vadios et salvos plegios Francum Jermy nuper de Quinton in comitatu tuo generosum, quod sit coram justiciariis nostris apud Westmonasterium a die Sanctæ Trinitatis in tres septimanas, ostensus quare vi et armis clausum ipsorum Roberti et Saræ, apud Quinton, fregit, et alia enormia ei intulit, ad grave damnum ipsorum Roberti et Saræ, et contra pacem nostram; et habeas ibi nomina plegii, et hoc breve: Teste meipsâ apud Westmonasterium, quarto die Junii anno regni nostri septimo. Pickering. Plegii de prosequendo, Johannes Doe et Ricardus Roe. Infra nominatus Francus nihil habet in ballivâ meâ, per quod attachiari potest. Henricus Fanningham armiger, vicecomes.' Quod quidem breve de *certiorari*, unacum recordo ejusdem, inter recordos sine die istius termini affilatur, &c. Et super hoc idem Francus, ut prius, dicit quod in recordo et processu prædicti, necnon in redditione judicii prædicti manifeste est erratum, allegando errores prædictos, per ipsum in formâ prædictâ superius allegatos: Et petit quod prædicti Robertus et Sara ad errores illos rejangant &c.

Rejoinder.

Et prædicti Robertus et Sara, per Jacobum Close attornatum suum, *gratis* hic in curiâ venerunt, et habito auditu errorum prædicti superius assignati, petunt auditum brevis de *certiorari* et

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et retorni ejusdem; et eis legitur in hæc verba: [*Recite tout le brief de certiorari, et le retorne de ceo; et proceede come ensuiſt*] Quibus lectis et auditis, idem Robertus et Sara statim dicunt, quod prædictum breve originale, per prædictum custodem brevium ut præfertur certificatum, non fuit breve originale in loquelâ in prædicto brevi erroris mentionatâ; quodque non habetur aliquod breve originale, inter partes prædictas de et in eâdem loquelâ, in custodia custodis brevium dictæ dominæ reginæ de banco, de recordo residens: et petunt breve dictæ dominæ reginæ, præfato custodi brevium dirigendum, ad certificandum dictæ dominæ reginæ, nunc hic, plenius inde veritas; et eis conceditur &c. Per quod præceptum est Henrico St. John barronetto, custodi brevium dictæ dominæ reginæ de banco prædicto, quod scrutatis, &c. quid de breve originali inter partes prædictas, *de placito transgressionis super casum*, invenerit, dictæ dominæ reginæ indilate ubique &c. certificet, unacum brevi prædicto ei inde directo &c. Qui quidem custos brevium, virtute brevis prædicti sibi inde directi, dictæ dominæ reginæ certificavit, quod scrutatis, &c. non habetur aliquod breve originale inter partes prædictas, *de placito transgressionis super casum prædicto*, de prædicto termino de recordo affilatum, quod dictæ dominæ reginæ certificare potuit, prout per breve illud sibi præceptum fuit. Quod quidem breve de *certiorari* ultimè mentionatum, et retornum ejusdem, sequitur in hæc verba: [*Et sic recite tout le brief, et le retorn inde.*] Et super hoc prædicti Robertus et Sara dicunt, quod nec in recordo et processu prædicti, nec in redditione judicii prædicti in ullo est erratum: Et petunt quod curia dictæ dominæ reginæ, nunc hic, procedat ad examinationem tam recordi et processus prædicti quam judicii superinde redditi; et quod judicium prædictum in omnibus affirmetur, &c. Sed quia curia dictæ dominæ reginæ nunc hic, de judicio suo de et super præmissis reddendo, nondum advisatur, dies inde datus est partibus prædictis, coram dominâ reginâ in &c. ubique &c. de judicio suo inde audiendo; eo quod curia dictæ dominæ reginæ nunc hic inde nondum &c.

This case was spoken to several times in court; particularly, in *Trinity* term, 1713, by Mr. *Salkeld* for the plaintiff in error, and Mr. *Lutwyche* for the defendant in error.

For the plaintiff it was insisted, that an ill original is not helped after verdict; though the entire want of one would have been aided: And to this purpose, the following cases were cited. 1 *Saund.* 317. 1 *Sid.* 425. *S.C.* 1 *Mod.* 3. 2 *Cro.* 655, 185. 5 *Co.* 37. 3 *Cro.* 722. *Sty.* 292. 352. 1 *Leon.* 69. 1 *Keb.* 177. 197. 238. 327. *God.* 408. *Yelv.* 108. 197. *Kib.* 155. 2 *Cro.* 671. 1 *Cro.* 272. 281.

For the defendant it was argued, that the writ of error was of an action ON THE CASE at the suit of *Curtis* and his wife, as executrix. That the original returned was *TRESPASS quarum clausum fregit*; and not by the plaintiffs as executrix. And that

if the plaintiffs in error would have shewn a connection between that original and the action, they should have brought up the whole entry of the original from the filazer's roll; and shewn the awarding of the *capias* thereon, and the defendant's appearance thereto. Besides, by the *placita* the issue is of *Trin. nono*, but the *clausum fregit* was of *Trin. septimo*: Add to this, that in the beginning of the declaration it is said, the defendant *attachiatus fuit ad respondendum* (the plaintiffs as *executrix*) *de placito transgressionis super casum*; which shews that it was not by the *clausum fregit*. And for the defendant these cases were cited; *Tyson v. Hildyard*, *Hil. 3 Ann.* 1 *Lev.* 69. *Lilly*, writ 435.

Regina *versus* Powell.

Pasch. 11 Annæ reginæ in B. R.

Quo warranto.
20.
8 Mod. 291.
Str. 782.
S. C.

BRECON *fs.* Memorandum quod Simon Harcourt armiger coronator et attornatus dominæ reginæ, in curiâ ipsius reginæ coram ipsâ reginâ, qui pro eadem dominâ reginâ in hac parte sequitur, in propriâ personâ venit hic in curiâ dictæ dominæ reginæ coram ipsâ reginâ apud Westmonasterium, die Martis proxime post tres septimanas Paschæ isto eodem termino; et, pro eadem dominâ reginâ, ex relatione cujusdam Johannis Walters armigeri, secundum formam statuti in hoc casu editi, dat curiæ hic intelligi et informari, quod burgus Brecon' in comitatu Brecon' est antiquus burgus; quodq. burgenſes burgi prædicti pro viginti annos jam ultimè elapsos et antea fuerunt, et adhuc sunt, unum corpus incorporatum et politicum in re facto et nomine, per nomen Ballivi Aldermannorum et Burgenſium burgi Brecon': quodq. sunt, et per totum tempus prædictum fuerunt, infra burgum prædictum, 15 capitales burgenſes et conciliarios ejusdem burgi; quodq. officium capitalis burgenſis et conciliarii burgi prædicti est, et per totum tempus prædictum fuit, officium præeminentiæ et magnæ fiduciæ infra burgum illum, rerum gubernationem et conservationem pacis ejusdem concernentem. Quodq. Hugo Powell de Castle-Madock in comitatu Brecon' armiger, primo die Januarii anno regni dominæ Annæ nunc reginæ magnæ Britanniæ, &c. decimo, et extunc hucusq. apud burgum prædictum usus fuit et exercuit, et adtunc utitur et exercet, officium unius capitalium burgenſium et conciliarium burgi prædicti, et clamat esse hujusmodi capitalis burgenſes et conciliarius, et habere omnia privilegia libertates et franchiseia ad officium capitalis burgenſis et conciliarii burgi prædicti spectantia et pertinentia, absque aliquo legali warranto, regali concessione, vel jure quocunq. De quibus quidem privilegiis libertatibus et franchiseiis idem Hugo Powell, super dictam dominam reginam, per totum t^{em}pus

tempus prædictum usurpavit, et adhuc usurpet, scilicet apud burgum prædictum; in dictæ dominæ reginæ nunc contemptum, et suæ regis prerogativæ grave damnum et prejudicium, necnon contra coronam et dignitatem suas, &c. Unde idem coronator et attornatus dictæ dominæ reginæ, pro eadem dominâ reginâ, petit advisamentum curiæ hic in premissis, et debitum legis processum versus præfatum Hugonem Powell in hac parte fieri; et ad respondendum dictæ dominæ reginæ *Quo warranto* clamat habere uti et gaudere libertates privilegia et franchesia prædictæ.

P. King.

Et modo, scilicet die veneris proxime post crastin' Sanctæ Trinitatis isto eodem termino, coram dominâ reginâ apud Westmonasterium venit prædictus Hugo Powell, per Johannem Pocklington attornatum suum, et habito auditu informationis prædictæ queritur se graviter vexatum fore et inquietatum, colore informationis prædictæ, et hoc minus justè; quia idem Hugo, qui habet licentiam curiæ dominæ reginæ ad separales materias in hac parte placitandum, dicit, quod 20 die Martii anno regni domini Philippi et dominæ Mariæ nuper regis et reginæ Angliæ, &c. et de tempore cujus in contrarium memoria hominum non existit burgus de Brecknock prædicto fuit burgus incorporatus diversis franchesiis libertatibus jurisdictionibus et custumis, ibidem usitatis gaudentibus et fruentibus: Quodq. eodem 20 die Martii, dicti Philippus et Maria rex et regina Angliæ per literas suas patentes, sub magno sigillo suo Angliæ figillatas, et gerentes datum apud Greenwich 20 die Martii anno regni sui secundo et tertio, quas idem Hugo nunc hic in curiâ profert, ordinaverunt constituerunt et concesserunt, quod burgenfes prædicti burgi de Brecknock et successores sui adtunc de cætero imperpetuum forent, vigore literarum patentium dicti nuper regis et reginæ, unum corpus incorporatum et politicum, per nomen Ballivi aldermannorum et burgenfium burgi Brecon; quodq. forent in burgo prædicto unus ballivus et duo aldermanni numero tantum, de capitalibus burgenfibus burgi prædicti eligendi: quodq. essent in burgo prædicto 15 homines de melioribus et probrioribus burgenfibus burgi prædicti, quorum ballivus et aldermanni ibidem tres fore, dicti rex et regina voluerunt, qui erint et vocabuntur capitales burgenfes et conciliarii burgi prædicti, et qui extunc forent commune concilium burgi prædicti; Qui omnes prædicti capitales burgenfes (non existentes ballivus seu aldermanni burgi prædicti) forent et essent assistantes et auxiliantes ballivo et aldermannis burgi prædicti pro tempore existentibus: Et si contigerit aliquem vel aliquos de prædictis capitalibus burgenfibus et conciliariis burgi prædicti obire vel a loco suo amoveri, quod tunc licitum foret et esset aliis capitalibus burgenfibus et conciliariis tunc supervenientibus vel remanentibus, vel majori parti eorum, alium vel pluries alios de burgenfibus burgi prædicti in locum vel loca ipsius capitalis burgenfis vel eorum capitalium

capitalium burgenſium, ſic mori vel amoveri contingentium, eligere nominare et præficere; et quod ille ſive illi ſic electi et præfecti præſtiterit vel præſtiterint, coram ballivum et aldermannos burge prædicti, ſacramentum corporale, ad officium illud bene et fideliter exequendum: Prout per literas prædictas (inter alia) plenius apparet. Et idem Hugo ulterius dicit, quod burgus Brecon' prædictus vocatur et cognoscitur tam per nomen burge Brecon' quam per nomen burge de Brecknock: Quodq. burgus de Brecon et burgus de Brecknock ſunt unus et idem burgus, et non alii neque diverſi; quodq. infra burgum prædictum habetur, et de tempore confectionis literarum patentium prædictarum habebatur, uſus et conſuetudo, ad eligendum burgenſes burge prædicti de melioribus perſonis in vel extra burgum prædictum inhabitantibus: Quodq. ipſe idem Hugo, exiſtens unus de melioribus perſonis extra burgum prædictum inhabitans, 29 die Septembris anno regni dominæ reginæ nunc ſexto, debito modo electus fuit in locum unius burgenſium burge Brecon' prædicti, viz. apud burgum Brecon' prædictum; et poſtea ſcilicet eiſdem die et anno in locum illum, apud burgum prædictum, debito modo admiſſus fuit: Quodq. poſtea ſcilicet 27 die Septembris anno regni dictæ dominæ reginæ nunc ſeptimo, locus et officium unius capitalium burgenſium et conciliarium eiſdem burge fuit ibidem vacans; quodq. in loco prædicto (ſic ut præfertur vacante) ipſe idem Hugo, adtunc et ibidem exiſtens unus burgenſium burge prædicti, apud burgum Brecon' prædictum, eodem 27 die Septembris, quodam Mereditho James adtunc et ibidem exiſtente ballivo burge prædicti, per majorem partem capitalium burgenſium et conciliarium burge prædicti tunc et ibidem debito modo aſſembla' exiſtentem, legitimè et debito modo nominatus electus et præfectus fuit, in locum unius capitalium burgenſium et conciliarium burge prædicti, ſcilicet eiſdem die et anno ultimè mentionatis, apud burgum prædictum: Et ſic ut præfertur electus et præfectus exiſtens, ſeperalia ſacramenta, ſuper ſacroſancta Dei evangelia, per leges hujus regni vel aliquo alio modo in hac parte requiſita legitime et debito modo cepit et præſtitit, ac ſuperinde debito modo admiſſus fuit in locum prædictum, unius capitalium burgenſium et conciliarium burge Brecon' prædicti. Et prædictus Hugo, juxta licentiam curiæ ei prius inde conceſſam ad placitandum ſeperales materias, ſecundum formam ſtatuti in hujusmodi caſu nuper editi et proviſi, ulterius dicit, quod infra burgum de Brecknock prædictum, de tempore cujus in contrarium memoria hominum non exiſtit, fuerunt et exiſterunt ballivus et duo aldermanni et capitales burgenſes et alii burgenſes, de tempore in tempus et ad omnia tempora per totum tempus prædictum eligibiles, et electi fuerunt et exiſterunt per ballivum aldermannos et capitales burgenſes burge prædicti, pro tempore exiſtentes, de melioribus perſonis in vel extra burgum prædictum inhabitantibus, juxta diſcretionem ballivi aldermanorum et capitalium burgenſium burge prædicti.

Et

Et idem Hugo ulterius dicit, quod prædicto 20 die Martii dicti Philippus et Maria rex et regina Angliæ, per literas patentes suas prædictas, ordinaverunt et constituerunt, quod burgenfes dicti burgi et successores sui forent unum corpus incorporatum; et quod de cætero erint infra burgum prædictum ballivus aldermanni et burgenfes tam capitales quam alii burgenfes, qui forent electi et admissi respectivè in officium prædictum, modo et formâ prout hic superius præfertur. Et idem Hugo ulterius dicit, quod consuetudo prædicta eligendi burgenfes burgi prædicti, de melioribus personis in vel extra burgum prædictum inhabitantibus, post confectionem literarum patentium prædictarum continuavit, prout antea fuit, viz. apud burgum prædictum; quodq. ad omne tempus et ad omnia tempora de confectione literarum patentium prædictarum hucusq. burgenfes burgi prædicti nominati et electi fuerunt, et nominari et eligi usi fuerunt et consueverunt, modo et formâ prædictâ, ex melioribus personis in vel extra burgum prædictum existentibus, videlicet apud burgum prædictum. Quodq. ipse idem Hugo, existens unus de melioribus personis, debito modo qualificatus fuisset eligendum fore in locum et officium unius burgenfium burgi Brecon' prædicti, juxta consuetudinem prædictam, viz. 29 die Septembris anno regni dominæ reginæ nunc sexto apud burgum Brecon' prædictum; ac adtunc et ibidem in locum unius burgenfium burgi prædicti debito modo electus et admissus fuit. Quodq. postea scilicet 27 die Septembris anno regni dictæ dominæ reginæ nunc septimo, locus unius capitalium burgenfium et conciliarium burgi prædicti vacavit, per resignationem cujusdam Willielmi Gwyn Vaughan armigeri, viz. apud burgum prædictum. Quodq. ipse idem Hugo, adtunc et ibidem existens unus burgenfium burgi prædicti, quodam Mereditho James adtunc existente ballivo burgi prædicti, per majorem partem capitalium burgenfium et conciliarium burgi prædicti, tunc et ibidem debito modo assemblat' existentem, legitimo et debito modo nominatus electus et præfectus fuit in locum unius capitalium burgenfium et conciliarium burgi prædicti, scilicet apud burgum prædictum. Quodq. ipse, sic ut præfertur electus et præfectus existens, separalia sacramenta, super sacrosancta Dei evangelia, per leges hujus regni vel aliquo alio modo in hac parte requisita, legitimo et debito modo cepit et præstitit; et superinde in locum prædictum capitalis burgenfis et conciliarii adtunc et ibidem admissus fuit. Ratione quorum quidem præmissorum, idem Hugo devenit, et abinde hucusq. fuit et existit unum capitalium burgenfium et conciliarium burgi prædicti; Et eo warranto idem Hugo, per totum tempus prædictum in informatione prædictâ specificatum, usus fuit et exercuit, et modo utitur et exercet, locum et officium suum unius capitalium burgenfium et conciliarium burgi Brecon' prædicti, et clamat esse hujusmodi capitalis burgenfis et conciliarii, ac habere omnia libertates privilegia et franchises officium prædictum spectantia, prout ei benelicuit et licet. Absque hoc quod ipse idem Hugo de libertatibus

privilegiis et franchesiis illis super dictam dominam reginam usurpavit seu usurpat, modo et formâ prout per informationem prædictam versus eum allegatur. Quæ omnia et singula idem Hugo paratus est verificare, unde petit judicium, et quod eadem libertates privilegia et franchesia, in formâ prædictâ per ipsum clamata, ei de cætero adjudicentur et allocentur; et quod ipse de præmissis exoneretur et dimittatur.

Nich. Lechmere.

Wm. Salkeld.

Sir Peter King (Nov. 15, 1712) was of opinion, that the queen's attorney might reply as follows; and likewise tender an issue on the defendant's traverse, viz. *quod usurpavit modo et formâ prout; et hoc petit quod inquiratur per patriam*. Or else, that he might entirely waive the special replication, and reply generally *quod usurpavit*; and so conclude to the country.

Mr. Lutwyche disagreed with Sir Peter, as to the general replication.

Et prædictus Simon Harcourt armiger coronator et attornatus dictæ dominæ reginæ, in curiâ ipsius dominæ reginæ coram ipsâ reginâ, qui pro eadem dominâ reginâ in hac parte sequitur, pro eadem dominâ reginâ dicit, quod dicta domina regina, per aliquam per eundem Hugonem superius primo placitam, ab informatione suâ prædictâ versus ipsum Hugonem habendâ præcludi non debet: Quia, pro eadem dominâ reginâ, quoad materias per prædictum Hugonem superius primo placitatas, dicit, quod bene et verum est, quod burgus Brecon' prædictus vocatur et cognoscitur tam per nomen burgi Brecon' quam per nomen burgi de Brecknock, quodque burgus Brecon' et burgus de Brecknock sunt unus et idem burgus et non alii neque diversi; quodque Philippus et Maria nuper rex et regina Angliæ, per prædictas literas patentes suas, in placito prædicti Hugonis mentionatas, ordinaverunt constituerunt et concesserunt, prout in placito ipsius Hugonis superius mentionatur: Sed idem coronator et attornatus dominæ reginæ, pro eadem dominâ reginâ, ulterius dicit, quod dicti Philippus et Maria nuper rex et regina, per easdem literas patentes, ulterius pro se et hæredibus et successoribus præfatæ reginæ Mariæ, concesserunt præfatis ballivo aldermannis et burgensibus burgi de Brecknock, quod ballivus aldermanni et commune concilium burgi prædicti haberent et facerent, ac habere et facere possent et valerent, de inhabitantibus burgi prædicti, de tempore in tempus, cives liberos de burgo prædicto, et illos vinculo juramenti stringere ad obediendum et observandum ballivo aldermannis et burgensibus burgi prædicti, pro tempore existentibus, in omnibus licitis; aliaque omnia et singula peragere et facere quæ ad utilitatem et proficuum burgi prædicti necesse fuerint; burgumque illum et omnes libertates

et

et franchesia ejusdem, pro posse suo, manutenendum et defendendum: Ac ulterius iidem dominus rex et domina regina, per easdem literas patentes, voluerunt et concesserunt, quod nullus inhabitans ibidem vendicaret libertates seu franchesia aliquas infra burgum prædictum, nisi fuerit continuè residens et conversans infra eundem burgum. Quæ quidem literæ patentes, dicti Philippi et Mariæ nuper regis et reginæ Angliæ, burgenfes et inhabitantes burgi de Brecknock post consecutionem literarum patentiũ prædictarum, scilicet 21 die Martii anno regni dicti domini Philippi et dominæ Mariæ nuper regis et reginæ tertio apud burgum de Brecon' prædictum acceptaverunt. Et idem coronator et attornatus qui &c. ulterius pro eadem dominâ reginâ dicit, quod locus et officium civis liberi burgi prædicti et locus et officium burgenfis burgi prædicti sunt eadem locus et officium, et non alii neque diversi; quodque prædictus Hugo, tempore prædictæ pretensæ electionis et admissionis suæ, in locum unius burgenfium burgi Brecon' prædicti, non fuit inhabitans burgi prædicti: Per quod electio et admissio ipsius Hugonis, in locum unius burgenfium burgi Brecon' prædicti, vacuæ fuerunt et nullius effectus. Absque hoc quod prædictus Hugo, tempore prædictæ pretensæ electionis suæ, prædictum in locum unius capitalium burgenfium burgi prædicti, fuit unus capitalium burgenfium burgi prædicti, prout in placito prædicti Hugonis allegatur. Et hoc idem coronator et attornatus dominæ reginæ, pro eadem dominâ reginâ, paratus est verificare. Et idem coronator et attornatus dictæ dominæ reginæ, qui &c. pro eadem dominâ reginâ, quoad materias per prædictum Hugonem superius secundo per licentiam curiæ placitatas, dicit, quod ballivus aldermanni et capitales burgenfes burgi prædicti fuerunt primo constituti per prædictas literas patentes prædictorum Philippi et Mariæ nuper regis et reginæ Angliæ. Absque hoc quod infra burgum de Brecknock prædictum, de tempore cujus in contrarium memoria hominum non existit, fuerunt et existerunt ballivus duo aldermanni et capitales burgenfes et alii burgenfes burgi prædicti, infra burgum de Brecknock prædictum, modo et formâ prout in eodem placito prædicti Hugonis supponitur. Et hoc idem coronator et attornatus dictæ dominæ reginæ qui &c. pro eadem dominâ reginâ, paratus est verificare, unde, pro eadem dominâ reginâ, petit iudicium, et quod prædictus Hugo Powell de præmissis in informatione prædictâ contentis convincatur, &c.

Regina v. Barratt.

Trin. 11 Annæ reginæ, in B. R.

Conviction
for deer-
stealing,
returned by
the justice's
administra-
trix.
Salk. 383.
S. C.

WILTS ff. Memorandum quod decimo die Februarii, anno regni dominæ Annæ, Dei gratiâ Magnæ Britanniæ, &c. quinto, apud Downton in comitatu Wilts prædicto, Laurentius King de Barwick sancti Johannis in comitatu Wilts generosus, in propriâ personâ, venit coram me Mauritio Bockland armigero, uno justiciarorum dictæ dominæ reginæ, ad pacem ejusdem dominæ reginæ in comitatu Wilts prædicto conservandam, necnon ad diversas felonias transgressionem et alia maleficia in comitatu Wilts prædicto perpetratas audiendum et terminandum, assignato; et adtunc et ibidem dat mihi præfato justiciario informari et intelligi, quod quidam Ricardus Barratt, de Barwick sancti Johannis prædicto in comitatu Wilts prædicto, Wheelwright, infra spatium 12 mensium proximè ante informationem prædictam coram me factam, viz. quinto diè Julii anno quinto supradicto, apud parochiam de Bower Charvin in comitatu Wilts prædicto, in quodam loco vocato Cobley Ware infra chaseam Thomæ Pyle armigeri vocatam Cranborne Chase, eadem chaseâ existente chaseâ et solo ubi damæ (Anglicè, fallow-deer) eodem quinto die Julii anno quinto supradicto, et per spatium 40 annorum et amplius ante-tunc prox' præterit' usualiter custoditæ fuissent, et adhuc custoditæ sunt, unam damam (Anglicè a fallow-deer) ipsius Thomæ Pyle, vi et armis, illicitè et injustè cum quibusdam retibus ibidem occidit et asportavit, absque consensu præfati Thomæ Pyle tempore occisionis et asportationis prædict' proprietarii (Anglicè owner) chaseæ prædictæ et damæ prædictæ, et sine consensu alicujus aliæ personæ, tempore occisionis et asportationis damæ illius vel ad aliquod tempus hucusque, precipuè fiduciariæ (Anglicè intrusted) ad custodiam chaseæ prædictæ vel damarum infra eandem chaseam, contra pacem dictæ dominæ reginæ nunc, et contra formam statuti in hujusmodi casu editi et provisum. Et superinde postea scilicet 18 die Februarii anno sexto supradicto, apud Downton prædictam in comitatu Wilts prædicto, quidam Henricus Exton tunc nuper de Wood Yeates in comitatu Dorset scissor, existens credibilis testis, in propriâ personâ suâ venit coram me præfato Mauritio Bockland, adtunc uno justiciarorum, &c. et sacramentum suum corporale super sacrosancta Dei evangelia, ad dicendam veritatem de et super præmissis in informatione prædictâ specificatis, præstat, coram me præfato Mauritio Bockland justiciario prædicto, sufficientem potentiam et auctoritatem habente ad sacramentum prædictum eodem Henrico in hac parte administrandum:

dum : Et prædictus Henricus, sic juratus existens, dicit deponit et jurat de et super præmissis in informatione prædictâ superius specificatis, quod prædictus Ricardus Barratt infra spatium 12 mensium, &c. [*ut supra, per tout le information*] Super quo prædictus Ricardus Barratt, post summonitionem ei inde prius in eâ parte debito modo factum, eodem 18 die Februarii anno quinto supradicti, apud Downton prædictum in comitatu Wilts prædicto, coram me præfato Mauritio Bockland, justiciario, &c. comparuit; et tam informatione prædictâ, quam causâ informationis illius et evidentiâ superinde datâ per prædictum Henricum Exton, auditis et plene intellectis existent, idem Ricardus Barratt per me præfatum justiciarium allocutus est, si quid pro se habeat vel dicere sciat, quare ipse prædictus Ricardus Barratt de præmissis ei superius in formâ prædictâ impositis non convincatur. Et quia, auditis et plene intellectis omnibus et singulis præmissis, per ipsum Ricardum Barratt in defensione suâ de et super præmissis allegatis, manifestè mihi præfato justiciario constat, prædictum Ricardum Barratt esse culpabilem de præmissis prædictis, in informatione prædictâ ei impositis modo et formâ prout in informatione prædictâ superius allegatur: ideo consideratum est per me præfatum Mauritium Bockland, justiciarium prædictum, quod prædictus Ricardus Barratt, per testimonium præfati Henrici Exton credibilis testis, super sacramentum suum coram me præfatum Mauritium Bockland ut præfertur præstitum, de præmissis ei ut præfertur impositis convictus est, secundum formam statuti in hujusmodi casu editi et provisi; et quod prædictus Ricardus Barratt forisfaciet summam 30 l. secundum formam statuti prædicti. In cujus rei testimonium ego præfatus Mauritius Bockland, justiciarius prædictus, huic recorro manum et sigillum meum apposui, apud Downton prædictum in comitatu Wilts prædicto, eodem 18 die Februarii, anno regni dictæ dominæ nunc quinto supradicti.

Ac etiam ego præfata Jana, serenissimæ dominæ reginæ nunc, ulterius humillimè certifico, quod supradictum recordum convictionis, prædicto tempore mortis supranominati Mauriti Bockland armigeri, in prædicto brevi huic schedulo annexo *nuper justiciarius* nominati, penes ipsum remanebat; et post mortem ipsius Mauriti, ratione administrationis in eodem brevi mentionati, ad manus meas devenit, et tempore emanationis et adventus mihi ejusdem brevis penes me residebat, ratione administrationis prædictæ. In cujus rei testimonium, ego præfata Jana Bockland manum et sigillum meum huic retorno apposui.

Jane Bockland, L. S.

Regina v. Simpson.

20 Mod.
248, 341,
378.
Str. 44, 475.
Raym. 1406.
S. C.
Conviction
for deer-
stealing,
where the
offender ap-
peared by at-
torney.

WESTMORELAND *sc.* Memorandum quod primo die Octobris anno regni dominæ Annæ, Dei gratiâ &c. duodecimo, apud Woodside in comitatu Westmoreland, quidam Willielmus Nicolson, de Julian Bower in comitatu prædicto, Parcarius, in propriâ personâ suâ, venit coram me Willielmo Nevinston armigero, iuratore justiciariorum, &c. et dat mihi informationem, quod Hugo Simpson, de Penrith in comitatu Cumberland, generosus, inter ultimum diem mensis Aprilis anno regni dominæ reginæ nunc duodecimo supradicto et ultimum diem mensis Maii eodem anno, ac infra spatium 12 mensium prox' ante informationem prædictam coram me factam, vi et armis, in parco Thomæ comitis Thanet vocato Whinfield scituato in parochiâ de Brougham in comitatu Westmoreland prædicto [existente parco et solo ubi cervi (Anglicè red deer) per totum tempus prædictum inter prædictum ultimum diem Aprilis et ultimum diem Maii anno duodecimo supradicto, fuere, necnon a tempore cuius in contrarium memoria hominum non existit fuissent, usualiter custoditi, et adhuc custoditi sunt,] duos cervos (Anglicè red deer) ipsius comitis, sine consensu ipsius comitis, proprietarii (Anglicè owner) parci prædicti tempore occisionis cervorum prædictorum et adhuc existent', ac proprietarii (Anglicè owner) cervorum prædictorum sic occisi tempore occisionis inde et antea existent', necnon sine consensu alicujus aliæ personæ præcipue fideiatae (Anglicè chiefly intrusted) ad aliquod tempus cum custodiâ cervorum vel parci prædicti, illicitè occidit et asportavit; scilicet apud parochiam de Brougham prædictam in comitatu Westmoreland prædicto, contra formam statuti in hujusmodi casu editi et provisi. Et superinde, postea scilicet sexto die Novembris anno duodecimo supradicto, apud Woodside prædictum in comitatu Westmoreland prædicto, quidam Johannes Barne de Woodhouse in parochiâ de Caldbeck in comitatu Cumberland celebs; existens credibilis testis, in propriâ personâ suâ venit coram me præfatum justiciarium, &c. et sacramentum suum corporale, super sacrosancta Dei evangelia, ad dicendam veritatem de et super præmissis prædictis, præstat coram me (habente sufficientem potestatem et authoritatem sacramentum prædictum eidem Johanni Barne in hac parte administrandum): et prædictus Johannes Barne, sic juratus existens, super sacramentum suum prædictum dicit deponit et jurat, quod prædictus Hugo Simpson &c. [Et sic per tout le information; donc procede come ensuist.] Et prædictus Hugo Simpson, licet debite summonitus fuit et notitiam habuit ad comparandum coram me præfato justiciario, &c. ad ostendendum, si quid habeat vel dicere

sciret quare ipse prædictus Hugo de separalibus præmissis prædictis superius ei impositis non convinceretur, non comparet in propriâ personâ suâ, sed quidam Ambrosius Nicholson generosus, unus attornatum curie dictæ dominæ reginæ de banco apud Westmonasterium, in propriâ personâ suâ comparet coram me præfatum justiciarium, &c. pro et ex parte et requisitione prædicti Hugonis; et præfatus Ambrosius, in defensione ipsius Hugonis de præmissis, offert et producit quendam Edwardum Walton, testem pro prædicto Hugone, ad dandum evidentiam coram me præfato justiciario pro et ex parte prædicti Hugonis et ad ejus requisitionem de et concernen' separalibus præmissis prædictis superius eidem Hugoni ut præfertur impositis: Et prædictus Edward Walton sacramentum suum corporale super sacrosancta Dei evangelia, ad dicendam veritatem concernen' præmissis, adtunc et ibidem præstat, coram me præfato justiciario (habente sufficientem potestatem, &c.) Et prædictus Edwardus Walton per me præfatum justiciarium est plene examinatus et auditus super sacramentum suum prædictum; ac tota evidentia præfati Edwardi pro prædicto Hugone, concernen' præmissis, per me præfatum justiciarium est plene auditus et intellectus: Et quia, auditis et plene intellectis tam totâ evidentiâ coram me præfato justiciario data, quam omnibus et singulis allegationibus et exceptionibus per præfatum Ambrosium Nicholson pro et in defensione ejusdem Hugonis dictis et allegatis, mihi præfato justiciario constat, quod prædictus Hugo Simpson est culpabilis de separalibus præmissis prædictis in formâ prædictâ ei superius impositis. Ideo consideratum est per me præfatum justiciarium, quod prædictus Hugo Simpson de prædictis separalibus præmissis superius ei ut præfertur impositis, per testimoniam præfati Johannis Barne credibilis testis, super sacramentum suum prædictum coram me sicut præfertur præstitum, convictus est, secundum formam statuti in hujusmodi casu editi et provisi; et quod prædictus Hugo Simpson forisfaciet summam 30l. pro quolibet cervo (Anglicè red-deer) prædictorum duorum cervorum, sic ut præfertur per ipsum Hugonem occis' et asportat', levandum et solvendum secundum formam statuti prædicti, scilicet, unam tertiam partem istarum duarum summarum 30l. præfato Willielmo Nicholson informatori prædicto; et aliam tertiam partem istarum duarum summarum 30l. pauperibus parochiæ de Brougham prædictæ ubi separalia offensa prædicta commissa fuerunt; et aliam tertiam partem istarum duarum summarum 30l. præfato comiti, existente proprietario ut præfertur prædictorum duorum cervorum sic occis' et asportat' secundum formam statuti prædicti. In ejus rei testimonium ego præfatus Willielmus Nevinson justiciarius prædictus huic recorde manum et sigillum meum apposui, dicto sexto die Novembris anno duodecimo supradicto.

Willielmus Nevinson.

Stratford

Stratford *versus* Neale.

Pasch. 3 Geo. rot. 183.

3 Mod. r.
Fortes. 350.
Str. 482.
S. C.
Declaration
in prohibition
on a suit for
tythes of bul-
locks.

COM' Wicklow ss. Edwardus Stratford armiger queritur de Benjaminus Neale clerico in custodiâ mareschalli Mareschalliæ dominæ reginæ coram ipsâ reginâ existente, de eo quod prædictus Benjaminus Neale, per nomen Benjamini Neale clerici rectoris rectoriæ de Baltinglass infra diocesem de Leighlin secutus fuit in curiâ Christianitatâ post prohibitionem regiam ei inde directam; pro eo videlicet, quod cum omnia et singula placita, de decimis petitis contra commune jus et contra leges hujus regni Hiberniæ, cognitionemque hujusmodi placitorum, ad dominam reginam nunc et coronam suam regiam, et non ad forum ecclesiasticum, specialiter spectant et pertinent. Cumq. per leges ejusdem regni nullæ terræ tenementa sive hereditamenta, infra idem regnum, cum solutione decimarum *dupliciter* onerari debent, in uno et eodem anno. Cumque etiam per leges ejusdem regni, quando aliqua persona, infra eundem regnum, solvit decimas feni succisi in aliquibus terris sive pratis, non debet in eodem anno solvere decimas pasturæ sive herbagii pro eisdem terris sive pratis; nec debet solvere decimas pro averiis sterilibus, de eo quod sunt pasta cum eodem feno super eandem terram. Cumq. etiam per leges ejusdem regni, cum aliqua persona solvit decimas grani ex aliquibus terris, non debet solvere aliquas decimas pro stapulis (Anglicè stubbles) earundem terrarum, in eodem anno: nec ullas decimas debet solvere pro bobus et afris carucæ; nec pro averiis juvenilibus, quæ depascit et nutrit pro usu carucæ suæ. Cumq. etiam, per leges ejusdem regni, cum aliqua persona, infra idem regnum, solvit decimas agnorum lanæ vitulorum et lactis, surgentium super pasturas suas, non debet in eodem anno solvere pro averiis sterilibus vel junioribus, pertinentibus ad et partibus de gregibus ex quibus tales decimæ solutæ fuerunt. Cumq. etiam prædictus Edwardus Stratford 25^o die Martii anno Domini 1706. et semper postea hucusq. seifitus fuit, et adhuc seifitus existit, in dominico suo ut de feodo, de villâ et terris de Baltinglass, Kilmurry, Holdingstown, Clogh, Irongrange, et Raheen, jacentibus et existentibus infra parochiam sive rectoriam de Baltinglass, in comitatu Wicklow prædicto; et eadem, per totum tempus prædictum, habuit et occupavit in manus suas proprias: et per totum idem tempus, per se et servientes suos, seminavit super terram prædictam diversa genera granorum, et exinde solvit annuatim decimas rectori ecclesiæ parochialis de Baltinglass prædictæ, vel ejus firmariis; ac etiam super pasturas terrarum prædictarum depascuit quamplurimos oves, durante prædicto tempore, et annuatim solvit rectori prædicto, decimas agnorum et lanæ exinde annuatim provenient';

ac

ac etiam super pasturas earundem terrarum, durante eodem tempore, depascuit diversas vaccas, et annuatim solvit per totum idem tempus decimas vitularum et lactis exinde provenient: Cumq. idem Edwardus, durante eodem tempore, annuatim succidit gramen crescentem in pratis (Anglicè meadows) earundem terrarum, et in fenum confecit, et solvit inde annuatim decimas rectori prædicto vel ejus firmariis; et fenum illud in acervis cumulavit, in eisdem pratis in quibus succisum fuit, et cum eodem depascuit ibidem boves (Anglicè bullocks) et alia averia steriles. Cumque etiam idem Edwardus, per totum idem tempus, nullos depascuit boves (Anglicè bullocks) super terras et tenementa prædicta, præter tales boves quales depascuit cum feno prædicto, ex quo solvit decimas ut prædictum est; [et illud tantum in pratis, in quibus fenum prædictum succisum fuit; vel in stapulis prædictis, ubi grana prædicta crescebant, et ex quibus granis decimæ ut præfertur solutæ fuerunt:] et boves carucæ; et boves juveniles pertinentes ad vel partes de gregibus ex quibus idem Edwardus Stratford solvit decimas vitularum et lactis ut præfertur; nec aliquos equos, præter equos pro usu carucæ; nec aliquos pullos equinos, nisi tales quales nutrit et pavit pro usu carucæ: et idcirco cum ulteriori sive aliâ solutione aliquarum aliarum decimarum pro bobus prædictis, vel pro equis et pullis equinis prædictis, vel pro aliquibus inde, per legem hujus terræ onerari non debet. Prædictus tamen Benjaminus Neale, ut rector ecclesiæ parochialis de Baltinglafs prædicto, præmissa prædicta satis sciens, machinans tamen et intendens ipsum Edwardum Stratford, contra leges hujus regni, gravari et opprimere, eundem Edwardum Stratford in curiâ Christianitatâ, coram reverendo admodo in Christo patre domino Bartholomeo, permissione divinâ Fernensis et Leighliensis episcopo, aut alio judicio sub ipso constituto, traxit in placitam; et detentionem vel non solutionem decimarum pro quibusdam bobus (Anglicè bullocks) et pro quibusdam pullis equinis ejusdem Edwardi, prætensi fuisse depasti per eundem Edwardum, in anno Domini 1707 et anno Domini 1708, super terras prædictas in parochiâ de Baltinglafs prædictâ traxit in placitam; cautè et subdolè libellans, quod quæstio de decimis spectat ad jurisdictionem judicii ecclesiastici loco in quo hujusmodi quæstio exoritur, et quod de jure decimæ solvi debent de pasturis et pascuis seu locis solummodo destinatis pascendis pecoribus; præsertim aridis seu sterilibus, de quibus nullum commodum aut emolumentum nascatur aut contingat pastoribus loco in quo hujusmodi annuales pascantur: Et quod ipse idem Benjaminus Neale jus titulum et interesse habuit, in prædictis annis 1707 et 1708, percipiendo recuperando et recipiendo duas tertias integras partes omnium et singularum decimarum, aliorumq. jurum ecclesiast. crescentium et contingentium infra limites et locos decimabiles prædictæ parochiæ de Baltinglafs; et quod ipse idem Edwardus, in prædictis annis 1707 et 1708,

tenuit et occupavit terras et tenementa supradicta; et adtunc eadem tenuit et occupavit, præsertim pecora pascend' causand' infra parochiam prædictam; et quod in annis prædictis pavit de suo in terris prædictis tot et tales annuales, quot et quales contineatur in schedulâ libello prædicto annexâ, nullum emolumentum ex annualibus prædictis aut ex eorum pasturâ provenientes eidem Benjaminò Neale rectori prædicto: Et quod præmissis non obstante idem Edwardus Stratford in anno supradicto decimas pasturæ annualium prædict' in schedulâ prædictâ content', et decimas pullorum equinorum in eadem schedulâ mentionat', attingentes ad valorem in eadem schedulâ mentionatam, non decimavit; licet sæpius ad id requisitus fuerit: In quâ quidem schedulâ continetur, quod idem Edwardus in annis prædictis et in mensibus inde in libello prædicto specificatis, pavit super terras de Baltinglafs prædictas nonaginta boves, (Anglicè bullocks): Super prædictas terras de Irongrange, triginta boves, (Anglicè bullocks): Super prædictas terras de Clogh, quinquaginta boves, (Anglicè bullocks): Super prædictas terras de Kilmurry, octoginta boves, (Anglicè bullocks): Super prædictas terras de Baltinglafs, quatuor equos et pullos equinos: Super prædictas terras de Irongrange, decem equos et pullos equinos: Super prædictas terras de Kilmurry viginti octo equos et pullos equinos: Et quod decimæ herbagii prædict' annual' unacum decimis pullorum equinorum prædict' attingunt ad £. 30 sterling. Prædictusque Benjaminus Neale prædictum Edwardum Stratford in dictâ curiâ Christianitatâ coram præfato iudicio spirituali comparere, et eidem Benjaminò in præmissis respondere minus justè astrinxit; ac ipse in eadem curiâ Christianitatâ superinde condemnari totis suis viribus conatur, et indies machinatur. Licetq. breve dominæ reginæ de prohibitione prius, viz. 12^o die Februarii anno Domini 1709, apud Baltinglafs prædictum in comitatu Wicklow prædicto ei in contrarium directum et deliberatum fuisset, in causâ prædictâ ulterius processit, ac placitam prædictam in curiâ Christianitatâ prædictâ, apud Baltinglafs prædictum in comitatu Wicklow prædicto, secutus fuit, eodem breve dictæ dominæ reginæ nunc non obstante, in dictâ dominæ reginæ nunc contemptum, et ipsius Edwardi Stratford damnum et prejudicium manifestum, et contra formam et effectum legis hujus regni. Ac licet prædictus Edwardus Stratford omnes dictas materias in lege et in facto in dictâ curiâ Christianitatâ placitasset et allegasset in exonerationem suam in præmissis; Idem tamen iudex spiritualis in eadem curiâ Christianitatâ illud admittere omnino recusavit: Unde idem Edwardus Stratford dicit quod deterioratus est, et damnum habet ad valentiam centum librarum sterling, et inde producit sectam, &c.

Et modo ad hunc diem, scilicet die veneris proximè post crastinum Sanctæ Trinitatis isto eodem termino, usque quem diem prædictus Benjaminus Neale habuit licentiam ad billam prædictam

inter

interloquendum, et tunc ad respondendum &c. coram dominâ reginâ apud le king's courts venerunt tam prædictus Edwardus Stratford, per attornatum suum prædictum, quam præfatus Benjaminus Neale per Daniele Wybrants attornatum suum; et idem Benjaminus defendit vim et injuriam quando &c. et contemptum et quicquid &c. et dicit quod ipse non secutus est placitam versus præfatum Edwardum Stratford contra prohibitionem regiam ei inde in contrarium directum et deliberatum, prout prædictus Edwardus per narrationem suam superius supponitur: Et de hoc ponit se super patriam; et prædictus Edwardus similiter.

T H E

T A B L E

To the REPORT of

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